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**SILENCE AS AN ENDORSEMENT OR ACCEPTANCE OF EMERGING
CUSTOMARY INTERNATIONAL LAW**

Master's thesis

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Introduction

Concept of customary international law (CIL) is an idea that there are informal, unwritten rules which are binding upon States. It is the important area of international law, where the law of State responsibility and State immunity, where applicable treaties do not exist.¹

Statute of International Court of Justice art 38 (1) states international conventions, international custom, general principle of law, judicial decision and teachings of the highly qualified publicists of various nations as sources of international law. Customary international law contains two elements- general practice of States known as objective element, and accepted legal obligation, also known as *opinion juris*, as subjective element.² International Court of Justice (ICJ) has stated in cases concerning North Sea Continental Shelf³, two Fisheries Jurisdiction cases⁴ and Military and paramilitary activities in and against Nicaragua⁵ the importance and meaning of customary international law.

There are three activities by states to establish of customary international law. A State can: freely subject itself to the customary rule (consent) or can keep silent (acquiescence) or consistently object the application of the rule. Silence may be interpreted as implied acceptance, or object towards the issue.⁶

According to Professor Nuno Marques Antunes silence as a concept in international law, also known as acquiescence (Latin *quiescere* means to be still) has primarily a substantive bearing. Rights and duties may be constituted, modified, disposed of or terminated by the effect of acquiescence. Once transposed into international law, the notion of acquiescence was developed and elaborated within the framework of the international legal system. This took place, throughout the last century, in a number of judicial and arbitral decisions, and also in doctrinal and scholarly writings. Acuter problems emerge nowadays when use of force emerge.

¹ Byers, M. Customs, Power and the Power of Rules. International Relations and customary International Law. Cambridge University Press, 1999.p 3, XI

² Art 38 (1) (a-d) of Statute of the International Court of Justice sets out sources of international law.

³ ICJ, North Sea Continental Shelf cases. 1969; para 74, 77

⁴ ICJ, Fisheries Jurisdiction cases (United Kingdom of Great Britain and Northern Ireland v. Iceland) 1972, 1973, para 52, 44

⁵ ICJ, Case Concerning military and paramilitary activities in and against Nicaragua, 1986, para 186

⁶ Gebeyehu, H. Does consent always matter in international law? Lawyr.it. Accessible <https://www.lawyr.it/index.php/articles/international-focus/682-does-consent-always-matter-in-international-law> (April 23, 2018) art 2

Silent conduct or inaction in respect of these issues will require a legal answer. A cautious approach to findings of acquiescence continues to be warranted, the burden of proof lying on the party invoking it. Instances in which this may be relevant are far from uniform, and silence or inaction is seldom an adequate manifestation of consent. The issues surrounding acquiescence relate ultimately to a sphere of discretion which States enjoy, their conduct being under scrutiny in what are usually rather complex situations.⁷

During last couple of years some of the states have engaged themselves in various unusual activities and other states have not reacted, nor condemned the activities it could be assumed that states have accepted the unusual behavior. One can claim that we are seeing of emergence or acceptance of new customary international law. Silence interpreted as unconditional acceptance of the new custom. There are many reasons for the silence: states are unaware of the behavior of other states, states do not understand the consequences of the inaction and silence, states do not understand the importance of the current times, states might wish to reinforce its political or diplomatic ties, etc. United States of America (USA) and United Kingdom (UK) are bombing ISIS oil trucks in Syria claiming the trucks are loaded by war sustaining objects.⁸ As no state protested it is considered now accepted behavior. Targeting “war sustaining” objects, even in the context of the fight against ISIS, sets a dangerous precedent and violates the established rules of International Humanitarian Law (IHL).⁹

The main aim of this study is to determine what is the meaning of silence as behavior in emergence or acceptance of possible new customary international law. The thesis is theoretical study and critical observation of the logic or enthusiastic interpretation that silence is immediate and unconditional acceptance of emerging new Customary International Law. The objective of the thesis is to examine, building on the examples of different approaches to customary

⁷ Antunes, N.S.M. Acquiescence. Max Plank Encyclopedia of Public International Law. Accessible <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1373?rskey=tnOAvH&result=1&prd=EPIL>. (April 23, 2018) art 1- 20

⁸ UK first air strikes on Syria target ISIS oilfields. Financial Times. Accessible <https://www.ft.com/content/735eb4c8-998f-11e5-9228-87e603d47bdc>. (Oct 12, 2017), U.S Warplanes strike ISIS oil trucks in Syria. New York Times. Accessible <https://www.nytimes.com/2015/11/17/world/middleeast/us-strikes-syria-oil.html>. (Oct 12, 2017) US Air Force bomb 238 ISIS oil trucks in Syria, Mail Online. Accessible <http://www.dailymail.co.uk/news/article-3331503/US-military-drops-leaflets-warning-civilian-truck-drivers-45-minutes-airstrike.html>. (Oct, 12, 2017)

⁹ Padeanu, I.E. Accepting that war-sustaining objects are legitimate target under IHL is a terrible idea. Yale Journal of International Law. Accessible <http://www.yjil.yale.edu/accepting-that-war-sustaining-objects-are-legitimate-targets-under-ihl-is-a-terrible-idea/>. (Oct 12, 2017)

international law, to identify whether silence as behavior contribute to emerging new customary norm. In addition to discussing the legality of the possibly the thesis offer comparative view on different State practice and scholars writings and analyze whether and how the current approach is shaping modern customary law. In order to achieve the objective, the thesis focuses upon the following research questions:

1. How legal scholars interpret silence as there is no definition about customary international law?
2. Is silence interpreted as unconditional acceptance or endorsement of the repeated behavior in customary international law?
3. If yes, then based on what conditions and criteria?
4. Are we seeing of emergence or acceptance of new customary international law about silence?

The hypothesis of the thesis is: silence is as endorsement or acceptance of emerging customary international law.

The main object of this study is based on states practice and legal scholar's publications of customary international law. I try to seek to establish an understanding weather and how the international customary law has changed or evolved about silence over time.

The systematic study of the research problem in customary international law and about silence is ever evolving and therefore a clear view on approach of silence as possible emerging customary international law is not quite clear and done yet. Inequality among actors in international community may have grated effect on customary law-making as it lacks formalized procedure of law-making and the central role is played by states behavior.

The thesis has two sections- first part will be emphasized on doctrine of costmary international law and its elements and their evolution, and second part will concentrate on the legal framework and sources of International Customary Law during fight against ISIS, the silences as interpretation of behavioral action and its legal meaning. The appropriate judicial practice is evaluated throughout the research paper to add value.

Method and resources: The principle research methods used for the thesis have been analytical methods. The method was used for the extensive research of legal literature, analysis of

available case law and legislation. Main sources are different legal writings of renewed scholars, International Committee of the Red Cross studies about IHL, United Nations General Assembly draft decision about identifying the customary international law, United Nations Security Council resolutions and case law of International Court of Justice.

Keywords, based on the Estonian Subject Thesaurus are: silence, International law, warfare

1 Concept of customary international law

International Law Association found in its report in 2000 that general customary international law is created by State practice which is uniform, extensive and representative in character¹⁰. The main emphasis is put on objective element of CIL as State practice. The report de-emphasizes the subjective part as *opinion juris* of the CIL.¹¹ In 2005 International Committee of Red Cross (ICRC) published a study about Customary International Humanitarian Law. United States of America has given its concerns about the study's faulty methodology and the flaws in study findings. In particular the ICRC study merges the State practice and *opinion juris* requirement into a single test.¹²

The classic theory of custom depends on a delicate, precarious, equilibrium between two opposite concerns: on the one hand, to permit customary rules to emerge without demanding the individual consent of every state; on the other hand, to permit individual states to escape being bound by any rule they do not recognize as such. To meet the first of these concerns, the classic theory narrows down the individual participation of each state to each of the two factors it regards as indispensable to the formation of a customary rule. The practice that constitutes the corpus of the customary rule is defined as "general," "consistent," "settled," "constant and uniform," "both extensive and virtually uniform"-but never as "unanimous" or "universal." As far back as 1925, Charles De Visscher pointed out that "to rely on a customary rule against a state, it is not always necessary to be able to prove that that state, by its personal actions, contributed to the establishment of the international practice from which the rule derived," and he referred in illustration to customary rules that had come into being on the basis of practices accepted by maritime nations but in whose elaboration the landlocked states had taken no part. Similarly, it is not required that each state, individually and personally, should have had the feeling of "conforming to what amounts to a legal obligation," which constitutes

¹⁰ The committee of the report contain leading scholars from South Africa, Yugoslavia, Denmark, Slovenia, Netherlands, France, Italy, Australia, UK, Russia, Sweden, Bulgaria, Bangladesh, India, USA, Croatia, Germany, Brazil, Japan, Switzerland, Poland, Estonia.

¹¹ International Law Association London Conference (2000) Formation of customary general international law. Accessible

<https://www.law.umich.edu/facultyhome/drwcasebook/Documents/Documents/ILA%20Report%20on%20Formation%20of%20Customary%20International%20Law.pdf>. (March 01, 2018) . pp 20

¹² International Committee of the Red Cross, reports and Documents. A US government response to the International Committee of the Red Cross study Customary International Humanitarian Law.

Accessible https://www.icrc.org/eng/assets/files/other/irrc_866_bellinger.pdf. (April 03, 2018) pp 2-3

opinio juris, the second traditional condition for the existence of custom.¹³

The ICJ's statute art 38 (1) (b) refers to international custom, as evidence of a general practice accepted as law, as a second source of international law (art 38 (1) (a) refers to treaty law as primary source of international law). Custom, whose importance reflects the decentralized nature of the international system, involves two fundamental elements: the actual practice of states and the acceptance by states of that practice as law.¹⁴

According to Professor Weil the acts accomplished **by** subjects of international law are so diverse in character that it is no simple matter for a jurist to determine what may be called the normativity threshold: *i.e.*, the line of transition between the non-legal and the legal, between what does not constitute a norm and what does. At what point does a "nonbinding agreement" turn into an international agreement, a promise into a unilateral act, fact into custom? Of course, this problem of the transition from non-law to law occurs in all legal systems, in particular under the guise of the distinction between moral and legal obligation. But the multiplicity of the forms of action secreted by the needs of international intercourse has rendered it more acute in that field than in any other, since in the international order neither pre-normative nor normative acts are as clearly differentiated in their effects.¹⁵

International law is the aggregate of the legal norms governing international relations. This means that the concept of international law is defined by both its nature and its functions. Its nature is to be an "*aggregate of the legal norms*" that dictate what its subjects must do (prescriptive norms), must not do (prohibitive norms), or may do (permissive norms) and constitute for them a source of legal rights and obligations. Its functions lie in "*governing international relations.*" International law is therefore at once a "normative order" and a "factor of social organization. These two facets are obviously interdependent. Thus, while the emergence of international law as a "normative order" is due to the need to fulfill certain functions, it will not be capable of actually fulfilling them unless it constitutes a normative order of good quality. In other words, the capacity of the international legal order to attain the objectives it was set up for will largely depend on the quality of its constituent norms. There

¹³ Weil, P. Towards Relative normativity in International law? American Journal of International Law, vol 77 (1983) Accessible http://heinonline.org/HOL/Page?handle=hein.journals/ajil77&div=36&start_page=413&collection=journals&set_as_cursor=3&men_tab=srchresults. (March 20, 2018) pp 413-414, art 28

¹⁴ Britannica Academic, Custom. Accessible

<https://academic.eb.com/levels/collegiate/article/international-law/106320>. (March 19, 2018)

¹⁵ Op cit Weil, pp 428

can therefore be no indifference in regard to anything affecting international legal norms, since without norms of good quality international law would become a defective tool.¹⁶

In this sense, international law is at its core a body of compulsory norms involving two or more states.¹⁷

The acts accomplished by subjects of international law are so diverse in character that it is no simple matter for a jurist to determine what may be called the normativity threshold: *i.e.*, the line of transition between the no legal and the legal, between what does not constitute a norm and what does. At what point does a "nonbinding agreement" turn into an international agreement, a promise into a unilateral act, and fact into custom? Of course, this problem of the transition from non-law to law occurs in all legal systems, in particular under the guise of the distinction between moral and legal obligation. But the multiplicity of the forms of action secreted by the needs of international intercourse has rendered it more acute in that field than in any other, since in the international order neither pre-normative nor normative acts are as clearly differentiated in their effects.¹⁸

There are three sources of international law- treaty law, customary law and general principle of law. Customary law is unwritten international law that develops over time and is based on state practice. Although unwritten, it binds all states, except those that fall into a very specific and narrow category of persistent objector. Treaties, by which states expressively agree to be bound in law, may be bilateral (two states) or multilateral (more than two parties) and treaty law may be coterminous with customary law in the sense that a treaty's provisions simply reflect customary law, or have come to reflect customary law that has subsequently emerged. However, conceptually it is useful to think of treaty law as consisting of express agreements that either recognize customary norms or create new legal norms that render an act or failure to act unlawful for the parties to treaty.¹⁹

International law is typically described as prohibitory in nature: any activity that is not prohibited is generally permitted. This is known as *Lotus principle* from Permanent Court of international Justice Case 1927 France v. Turkey²⁰. According to Schmitt et al, even when law

¹⁶ Op cit, Weil, P. Towards Relative normativity in International law? Pp 413-414

¹⁷ Schmitt, M. et al. The Nature of International Law Cyber Norms. International Cyber Norms: legal, policy & Industry perspectives. NATO CCD COE Publications, Tallinn: 2016 pp 23-26

¹⁸ Op cit Weil, p 415 art 5

¹⁹ Op cit Schmitt, M. pp 26

²⁰ Permanent Court of International Law, France v. Turkey 1927 Lotus case judgement. Accessible https://web.archive.org/web/20101210073754/http://www.worldcourts.com/pcij/eng/decisions/1927/1927.09.07_lotus.htm. (March 15, 2018)

does exist, it may prove lacking when meeting unanticipated circumstances and thus is occasionally breached as part of the process of creating a new norm. Indeed it is often said that customary law norms are made in the breach. If a state treats a customary norm as inconsistent with their need to ensure, they may begin to act contrary to the norm. Over time, their state practice could be viewed by other states as legal. Once the international law boundaries of conduct are demarcated domestic legal, political, ethical and other norms can operate to further restrict or require particular conduct. International law norms merely define the space within which states may engage in normative construction. Of course, states may act to transform these non-legal norms into those with legal authority by adopting a treaty incorporating them or engaging in state practice that crystallizes over time into customary law.²¹

Permanent Court of International Justice, is today universally accepted as accurately setting forth the international law. Subparagraphs delineates the two secondary sources of law used to elucidate that law: judicial decision and the work of distinguished scholars. It must be cautioned that secondary sources are not in themselves law. In particular and unlike the practice in many domestic jurisdictions, the decisions of tribunals are binding on the parties before the court,²² a fact codified in Article 59 of the Statue. Nevertheless, such decisions and scholarly works are highly persuasive in interpreting treaty provisions and identify customary law. Codes of conducts or statements of best practice are not binding on states in the same manner as legal norms, and their violation does not involve the same remedies. While the sanctioning of violations of international legal norms is complicated by the general absence of a compulsory enforcement mechanism, states are nevertheless significantly more reluctant to breach legal, as opposed to other, types of norms. Traditionally norms of international law were viewed as binding only on states. It was left to individual states to address the conduct of individuals and organisations that fell under their personal jurisdiction when engaged in activities that were within their subject matter competency. Although international law continues to primarily govern international relations between states, in the last century it has increasingly come to address individual conduct. Classic examples include international legal norms that permit universal jurisdiction over certain acts such as war crimes. To amount to international law all such norms must be agreed to by multiple states, either through treaty or the development of customary law. The expression ‘customary international law’ concerns, on the one hand, the process through which certain rules of international law are formed, and, on the other, the rules

²¹ Op cit, Schmitt et al, pp 27

²² Statue of ICJ art 59 states the decision of the Court has no binding force except between the parties and in respect of that particular case.

formed through such a process. While these rules are not necessarily general in scope, all existing general rules of international law are customary. Even though language is necessary to communicate their content, expression through language is not an indispensable element of customary international law rules. The irrelevance of linguistic expression excludes interpretation as a necessary operation in order to apply them. Recently customary rules have developed in connection with written texts, whose interpretation may be relevant for determining the existence and contents of these rules. As we will see, contemporary customary international law, although unwritten, is increasingly characterized by the strict relationship between it and written texts. Such texts may be the point of departure for the formation of a customary rule, and sometimes (in the case of widely ratified conventions) the basis for stating the existence of certain customary law rules. The essential characteristic which customary international law rules have in common is the way they have come into existence and the way their existence may be determined. While customary international rules may give rise to the same problems as other categories of rules—such as: Does the rule apply to certain facts? What is its relationship with other categories of rules?—the preliminary question of their existence is more complex than that, for instance, of the existence of a treaty rule, as it is necessary to ascertain whether, at the relevant time, the conditions for its existence are satisfied. In this way, consideration of the customary international law process becomes an indispensable element for the application of customary international law rules. Moreover, in order to apply a customary rule, it is not sufficient that it has come into existence: it must exist at the relevant time, as the process through which customary rules are modified or extinguished is the same as that through which they come into being.²³

Before the twentieth century, CIL was the principal form of international law. It was often referred to as part of the "law of nations," a category that included both public international law (rights and duties between nations) and private international law (rules governing private international relationships and disputes, such as conflict-of-law principles, rules for enforcement of foreign judgments, and the "law merchant"). Issues regulated by the public law component of the law of nations included, for example, rights on the seas, conduct during wartime, and diplomatic immunity.²⁴ There has since been a proliferation of treaties, both in

²³ Max Plank Encyclopedia of Public International Law. Customary International Law. Accessible <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1393?rskey=z7TKv4&result=1&prd=EPIL>. (Feb 28, 2018)

²⁴ Bradley, C. A et al. Withdrawing from International Custom, 120 Yale Law Journal 202, 2010. Accessible

quantity and range of subject matter, especially after the establishment of the United Nations system at the end of World War II. As a result, most of the major issue areas that were historically covered by CIL are now covered, to one degree or another, by treaties. For example, the Law of the Sea Convention addresses rights on the seas," the Geneva Conventions address conduct during wartime,' and the Vienna Convention on Diplomatic Relations addresses diplomatic immunity." Treaties also address numerous issues that were not historically regulated (at least extensively) by international law, including environmental conservation, the protection of human rights, and the prosecution of international crimes. CIL nevertheless continues to play an important role in international law and adjudication, regulating both within the gaps of treaties as well as the conduct of nonparties to the treaties." In addition, some longstanding CIL issues (such as the immunity of heads of state and limits on the extraterritorial application of national law) are still not regulated by any comprehensive treaties. Finally, newly emergent issues will often lack a treaty regime for a time. A possible (although contested) current example is the lack of a treaty addressing the standards for detention and trial of terrorists engaged in an armed conflict with a nation-state." The standard definition of CIL is that it arises from the practices of nations followed out of a sense of legal obligation. Under this account, there are two elements to CIL: an objective state-practice element and a subjective sense-of legal-obligation (or *opinio juris*) element. This is the conventional definition, although some commentators have attempted to deemphasize the subjective element and others have attempted to deemphasize the state-practice element.²⁵

Whatever the proper role of consent in international law, CIL (as it is currently conceived) is less consensual than treaty-based law. Treaties bind only nations that have affirmatively ratified them, and, as discussed, nations often have the ability to withdraw from treaties, albeit sometimes with a notice requirement. CIL, by contrast, binds new states regardless of their consent and binds existing states based merely on their silence. There is also no unilateral right of withdrawal. *Jus cogens* norms are even less consensual.²⁶

Customary international norms are unique as they are unwritten. In many fields as law of the sea, jus ad bellum, International Humanitarian Law, customary international law was historically predominant. Only 20th century did treaty law on the subject come into its own.

<http://heinonline.org.ezproxy.utlib.ut.ee/HOL/Print?collection=journals&handle=hein.journals/ylr120&id=204>. (March 19, 2018) .p 208

²⁵ Op cit Bradley, A. C et al p 209

²⁶ Op cit, Bradley, C. A et al. pp 202-275

Despite the proliferation of treaties in the last century customary law retains its significance. In great part, this is because most treaty regimes are not universal. As an example, neither USA nor Israel are party to the 1977 Additional Protocols, although both states have been involved in numerous conflicts since their adoption. To the extent that non-party states comply with the norms expressed in a treaty they do so only on the basis that they reflect customary international law. Rules expressed in a treaty sometimes crystallize into customary law, even though they did not mirror a customary norm at the time of adoption. The classic case is that the regulations annexed to the 1907 Hague Convention IV. When a particular point encompassed in the material of an agreement is not directly addressed, any existing customary law will govern the matter. Although unwritten customary law is not as binding on states as treaty law.

As noted by the ICJ in the *Asylum* case:

“The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practiced by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom “as evidence of a general practice accepted as law”.²⁷

According to Instrument Choice Perspective sometimes custom functions as a complement to treaties or soft law, as the literatures on legalization and instrument choice at times suggest. But, the distinctive (and less malleable) characteristics of custom, as compared to soft law and treaties, create continuing incentives for states to choose custom over the other legal instruments if doing so advances their respective national interests or shapes the content, scope, or application of international rules in ways that favor them. If this account is correct, the demand for custom will not be affected by whether a particular subject area becomes more heavily populated by treaties and/or soft law. States dissatisfied with the content of non-binding norms or treaty provisions might, for example, attempt to develop alternative customary rules with different substantive obligations. Or states might agree with the substance of a treaty or soft law, but turn to custom because of its distinctive design features, such as its preclusion of

²⁷ *Asylum case, Columbia v. Peru*, ICJ judgement 20 Nov. 1950 p 14. Accessible <http://www.icj-cij.org/files/case-related/7/007-19501120-JUD-01-00-EN.pdf>. (March 15, 2018)

the ability to “opt-out” by non-ratifications, treaty withdrawals, or reservations.²⁸ States can generate custom in a range of potentially important context. Customs form primary in three situations;

1. When all states benefit from a customary rule with low distribution cost.
2. When powerful nations impose a custom on weaker states and
3. When states seek to entrench shared normative values. Outside of those three domain less likely a new custom forms.

Custom remains relevant even in the age of soft law and treaties. For example states may use custom to unbundle certain negotiated aspects of multilateral conventions, especially those that preclude reservations.²⁹

In 2000 the International Law association adopted an extensive statement of principles concerning the formation of International Law Commission (ILC) after years of work by special committee. Although rightly regarded as a major contribution the statement provoked controversy by de-emphasizing the opinion juris requirement for CIL. Debate about the methodology for determining CIL rules also emerged in the wake of a widely discussed study in 2005 by the International Committee of the Red Cross on customary international humanitarian law. In 2012 the International Law Commission³⁰ began to address one of the last major uncodified areas of public international law: how norms of customary law (CIL) are to be identified.³¹ Project seeks to explain how to identify rules of customary international law and their content in order to assist no specialists in international law.³²

²⁸ Hefner, R. L et al. Customary International Law: An Instrument Choice Perspective. Michigan Journal of International Law. Volume 37, Issue 4, 2016. Accessible <https://repository.law.umich.edu/cgi/viewcontent.cgi?referer=https://www.google.ee/&httpsredir=1&article=1340&context=mjil>. (March 02, 2018) pp 596-597

²⁹ Op cit Helfner pp 568

³⁰ International Law Commission. Summaries of the Work of the International Law Commission. Accessible http://legal.un.org/ilc/summaries/1_13.shtml. (Feb 28, 2018)

³¹ Fox, H,G. Security Council Resolutions as Evidence of Customary International Law. EJIL:Talk! Accessible <https://www.ejiltalk.org/security-council-resolutions-as-evidence-of-customary-international-law/>. (March 01, 2018)

³² Op cit Bradley pp 2-3

1.1 General customary law

Customary rules are the result of a process—whose character has been qualified by a number of authors as ‘mysterious’—through which elements of fact, empirically verifiable, acquire a legal character thus creating rights and obligations for the subjects of international law. One of the main objects of contention concerns what it is that makes factual elements legally binding in international law. This is the problem of the basis of customary international law. A central question is whether there is a rule that makes customary rules binding, and, if it exists, what its content is. The views of scholars on the subject may be grouped in two categories, depending on whether such rule is deemed to exist. The position that considers that such a rule exists, which may be indicated as positivist, includes one group which deems that custom is not essentially different from agreements: it is a kind of tacit, and sometimes presumptive, agreement. Consequently, the rule on which the binding character of customary rules depends is *pacta sunt servanda*, the very rule on which the binding character of agreements depends. Other positivist authors (Legal Positivism) criticize the assimilation of customary rules with treaty rules as being a fiction. They state that customary rules are different from treaty rules and seek a rule of a level higher than customary rules as a basis for the binding character of these rules. This rule has a peculiar nature, as it is a ‘hypothetical’ rule, the hypothesis upon which the system is based. ‘Spontaneous law’ theory - Customary rules emerge ‘spontaneously’ from the international community - has been developed in particular by Italian authors of the mid-20th century (M Giuliano, R Ago, G Barile), and is followed by well-known scholars such as P Reuter and HLA Hart. In this theory existence of rules depends on whether it can be empirically ascertained that they are considered as binding by the members of the international community and whether they function as such in the relationships between these members. Closely connected with the question of the basis of customary international law is the question of which facts are to be ascertained empirically in order to determine that a customary international rule has come into existence. A key aspect of this question is whether these facts are produced by the will of States or through an involuntary process. While the latter question is easily answered if the view that the basis of customary international law is the *pacta sunt servanda* rule is accepted, as customary rules would be produced in the same way as treaty rules, the question is more difficult if one starts from the spontaneous law approaches. According to these approaches, the customary process is not a voluntary one. What counts is that, as mentioned, certain facts should be empirically determined. The prevailing view is that these facts are to be grouped in two elements, an objective one, the repeated behavior of States

(*diuturnitas*), and a subjective one, the belief that such behavior depends on a legal obligation (*opinio iuris sive necessitatis*). While the *opinio iuris* is by definition an opinion, a conviction, a belief, and thus does not depend on the will of States, the conduct of States is always the product of their will. What makes the discussion complex is that in willing to behave in a certain manner States may or may not be willfully pursuing the objective of contributing to the creation, to the modifications or to the termination of a customary rule. This applies also to the expressions of views as to whether certain behaviors are legally obligatory or as to whether a certain rule of customary law exists: these may be real expressions of belief—manifestations of *opinio iuris*—or acts, corresponding or not to true belief, voluntarily made with the purpose of influencing the formation, the modification or the termination of a customary rule. These latter expressions of views are objective facts rather than subjective beliefs. The difficulty of distinguishing behaviors and expressions of views that are, or are not, made with the will of influencing the customary process, explain why in modern international law, together with the prevailing theory of the two elements of customary law, theories are often held supporting the view that only the objective, or only the subjective element, is decisive for the existence of a rule of customary international law and views that consider decisive only material facts and others that consider that manifestations of opinion are relevant.³³

International community sees international custom as evidence of a general practice accepted as law.³⁴ The actual practice of states (termed the “material fact”) covers various elements, including the duration, consistency, repetition, and generality of a particular kind of behavior by states. All such elements are relevant in determining whether a practice may form the basis of a binding international custom. The ICJ has required that practices amount to a “constant and uniform usage” or be “extensive and virtually uniform” to be considered binding. Although all states may contribute to the development of a new or modified custom, they are not all equal in the process. The major states generally possess a greater significance in the establishment of customs. For example, during the 1960s the United States and the Soviet Union played a far more crucial role in the development of customs relating to space law than did the states that had little or no practice in this area.³⁵

³³ Op cit Max Plank, customary international law

³⁴ Statue of the International Court of Justice, art 38, para 1(b)

³⁵ Op cit, Britannica Academic, custom

Customary international law, it is generally agreed, finds its source in the widespread consistent practice of states. International custom is seen as a source of international law because the thought is that if states act in a certain consistent manner, then such states may be acting in such a manner because they have a sense of legal obligation – dubbed *opinio juris*.

1.1.1 State practice

The 1st prong the test state practice includes both physical and verbal acts of state. To qualify as state practice the conduct in question must generally occur over an extended period of time. The classic illustration is the 1900 US Supreme Court case the *Paquete Habana*³⁶ in which the court looked into the practice of numerous countries over a period measured in centuries to conclude that fishing vessels were exempt from capture by belligerents during an armed conflict. This temporal condition has deteriorated over time. As an example in the North Sea Continental Shelf case³⁷, the ICJ in dealing with the customary law of the sea held that the passage of only a short time is not necessarily a bar...if state practice including that of states whose interests are specially affected is both extensive and virtually uniform. Perhaps the best illustration of the weakening of the requirement of long-term practice is the development of customary space law, an example suggest that the relative novelty of cyber operations does not necessarily preclude the rapid emergence of cyber specific customary international law. The state practice essential to establishing customary law must, even if of limited duration, be consistent. When there are significant deviations from a practice by states, which may include both engaging in an activity and refraining from one, a customary norm cannot materialize. Although minor infrequent inconsistencies do not constitute a bar to such emergence, repeated inconsistencies generally have to be characterized by other states as violations of the norm in question before a customary norm can be said to exist. For instance, it is clear that the prohibition on the use of force set out in Article 2(4) of the UN Charter constitutes a customary norm; yet states have historically engaged in the use of force and continue to do so today. The saving factor is that when they do, their conduct is, absent the justification of self-defense, typically styled by other states as wrongful.³⁸

There is no set formula as to the number of states that must engage in a practice

³⁶ The *Paquete Habana* 175 U.S. 677 US Supreme Court, 1900. The primary holding is: Customary international law is an accepted part of American law and can be applied by federal courts.

³⁷ North Sea Continental Shelf case, ICJ judgement 20 Feb. 1969.

³⁸ *Op cit* Schmitt et al. pp 39-41

before a norm crystallizes, although the greater the density of practice, the more convincing the argument that crystallization has occurred. Of particular importance is the diversity of the states involved on issues such as their geopolitics and legal systems, and the fact that ‘specially affected states’ have engaged in the practice or expressed their view of such practice when engaged in by other states. A specially affected state is one upon which the norm will operate with particular resonance. As an example, the International Committee of the Red Cross (ICRC) has opined that ‘specially affected states’ with respect to the legality of weapons include ‘those identified as having been in the process of developing such weapons’. In cyberspace, the US would qualify as a ‘specially affected state’ in light of its centrality to cyber activities and its development of military capacity in the field. The term ‘*opinio juris*’ refers to the requirement that a state engage in a practice, or refrain from it, out of a sense of legal obligation. In other words, the state must believe that its actions are required or prohibited by international law. It is often the case that a state’s behavior is motivated by other factors, such as policy, security, operational, economic and even moral considerations. For instance, Estonia actively seeks to maintain a clean cyber environment. It does so, not because it believes that the international legal requirement of ‘due diligence’ requires such measures, but rather for cyber security reasons such as to prevent the establishment and use of botnets in the country. Such practices have no bearing on the creation of a customary law norm.³⁹

The fact that various norms converge to govern state conduct makes it necessary to deconstruct state practice to determine whether a state is acting out of a sense of legal obligation or is instead motivated by ethical or policy concerns. Obviously, it is often difficult to ascertain the rationale underlying a particular practice; care must be taken in drawing inferences as to *opinio juris* based solely on the existence of state practice. For instance, the ICRC cited many military manuals as evidence of *opinio juris* in its 2005 Customary International Humanitarian Law study. In response, the US objected that the provisions found in military manuals were often as much the product of operational and policy choice as legal obligation. A similar criticism frequently attends the citation of UN General Assembly resolutions as support for the existence of a customary norm, because states can vote in favor of such legally non-binding instruments for purely political reasons. The point is that when the basis for a practice or assertion is unclear, it does not comprise the requisite *opinio juris*. Despite this difficulty, states do engage in conduct and issue statements that clearly indicate their characterization of certain practices as required (or not) by customary international law. As an example, although the US

³⁹ Op cit Schmitt, pp 40-41

is a party to neither the Law of the Sea Convention nor Additional Protocol I, it often confirms that it views certain provisions of those instruments as reflective of customary international law. Once a customary norm has emerged, it is applicable to all states, including those that did not participate in the practice that led to its crystallization. Such norms are even binding on states that are created after the customary norm has developed. However, there are a number of exceptions to this general principle. In particular, a state may ‘persistently object’ to the norm’s formation as it is emerging. If the norm nevertheless emerges, the persistent objector is arguably not bound by it. In this regard, the role of ‘specially affected states’ is paramount. It would be very unlikely that a customary norm could emerge over the objection of such a state. For example, given the military wherewithal of the US, and its frequent involvement in armed conflicts, it would be difficult for an IHL cyber norm to materialize in the face of a US objection thereto. Fortunately, assertions of persistent objection are infrequent; rather, disagreement regarding customary norms typically surrounds the scope of a rule, not its existence. In certain limited circumstances, a customary norm may be regional or even local in character. To illustrate, in the *Asylum* case, the ICJ found that a regional customary norm applied in Latin America, whereas in the *Rights of Passage* it determined that another existed between two states with respect to passage across India to Portuguese enclaves in that state. It is foreseeable that regional norms might develop for cyber activities, particularly where states of a region are similarly situated in that regard, as in the case of Europe.⁴⁰

1.1.2 Challenges to identify state practice

According to UN General Assembly document from International Law Commission on Identification of customary international law states that, certain categories of evidence are much harder to find than others and some may legitimately need to remain confidential. First, while the legislative and judicial practice of States is widely available, accounts of the executive conduct of States are much more difficult to ascertain and evaluate. For instance, diplomatic correspondence may be classified as confidential. Another example is executive conduct in the field of the law of armed conflict. While some States publish their military manuals, many others do not; more generally, executive conduct “on the ground”, such as military conduct, is not always reported, or may be reported by news services, the accuracy of which might be difficult to evaluate. In addition, detailed reports of such conduct may exist but remain confidential: the International Committee of the Red Cross regularly collects information about

⁴⁰ Op cit Schmitt, pp 42-43

the practice of States while helping Governments in fulfilling their legal obligations, but not all such information is made public; indeed, confidential reports sent to the attention of Governments are an important part of the work of the International Committee of the Red Cross.⁴¹ The arbitral tribunals are another category of sources that are not uniformly available. A number of arbitral proceedings remain confidential and are never reported. Not all the pleadings of States before international courts and tribunals, including arbitral tribunals, are publicly available. In relation to international organizations, while it is generally possible to find online versions of official documents and records of meetings, many documents that are potentially relevant as evidence of customary international law are never issued as official documents or otherwise remain confidential. For example, the World Bank does not publish the verbatim or summary records of meetings in which representatives of States participate, nor does it publish the video or audio recordings of such meetings, or the diplomatic correspondence addressed to or received from States. In addition, the World Bank collects information on the conduct of States in relation to its mandate and activity, but does not publish such information. In general, as noted above, the legal opinions of counsel of international organizations are often unpublished and some of the diplomatic correspondence addressed to or from States may only be made available after a certain number of years in the archives of the international organization.⁴²

1.1.3 *Opinio juris*

After a practice has been established, a second element converts a mere usage into a binding custom—the practice must be accepted as *opinio juris sive necessitatis* (Latin: “opinion that an act is necessary by rule of law”). If enough states act in such consistent manner, out of a sense of legal obligation, for a long enough period of time, a new rule of international law is created. There can also exist regional customary law which is binding on a group of nation states in a particular region, but not upon the international system as a whole as stated in see *Asylum case* (Columbia v. Peru) [1950] ICJ Rep 266. The system can thus be thought of as circular, in that states are in effect creating a rule, through acting in conformity with such rule over a period of time, because they feel they are legally obligated to do so. What of the situation, however, when one has an inconsistency between state practice and *opinio juris* (on the part of one or a group of states)? According to the International Court of Justice, in such situations

⁴¹ UN GA Document from International Law Commission on Identification of customary International law, Jan 12, 2018. Accessible <http://legal.un.org/docs/?symbol=A/CN.4/710>. (April 03, 2018) pp 27-28

⁴² *Op cit* UN GA document pp 28-29

state conduct which runs counter to the rule should be viewed as a violation of such rule, not as evidence that the state does not intend to recognize it: as stated in *Military and Paramilitary Activities case (Nicaragua v. US)*[1986] ICJ Rep 14, at 98. Customary international law depends upon the consent of nation states, which can be either explicit or implicit. If a rule of customary international law is emerging and a nation state remains silent, then this can be seen as giving implicit consent that the nation state will be bound by the new customary rule: as stated in Restatement (Third) of the Foreign Relations Law of the United States (1987), at sect. 102 comment d. Thus, if in theory a nation state does not wish to be bound by a new rule of customary international law, then it can, in theory, vocally object and announce that it does not view itself as bound. New nations, however, it is generally held, cannot choose between the various rules of customary international law – they are bound by all of the accepted customary rules (at the point of independence). *Opinio juris* plays a key role in elevating a regular customary international law norm into a *jus cogens* norm, for only when the majority of states in the international system believe that such a norm cannot be persistently objected to, or contracted out of, does a regular customary norm achieve elevation to a *jus cogens* norm. *Opinio juris* plays a key role in elevating a regular customary international law norm into a *jus cogens* norm, for only when the majority of states in the international system believe that such a norm cannot be persistently objected to, or contracted out of, does a regular customary norm achieve elevation to a *jus cogens* norm. Running parallel to *jus cogens* norms are what are called obligations *erga omnes*. Obligations *erga omnes* are obligations considered so vital and important within the international system (usually in the form of *jus cogens* norms) that any state (whether directly affected or not) may sue another state in order to compel the obligation to be met.⁴³

Development within the International Court of Justice- the past few decades have seen a concerted movement in legal scholarship which has sought to redefine the sources of customary international law away from a blanket reliance on these two sources. At its most extreme, this scholarship argues that international treaties, especially those encompassing human rights obligations, actually generate international legal norms, because such conventions are inevitably not simply the codification of existing legal norms but rather the creation of new ones. Relying, at times, on findings from the International Court of Justice, a framework has been presented by this scholarship which seeks to modify the role of prolonged state practice and *opinio juris* in the process of transforming conventional or treaty-based international law

⁴³Op cit, Baker B. R. pp 176-177

(binding only on the state signatories) into customary international law (binding on all) This non-traditional scholarship presents a framework which insists that the signing of a convention or treaty by a wide group of countries is, in and of itself, evidence of the creation of new customary legal norms. Although this non-traditional scholarship has ultimately been successful in redefining the sources of customary international law, such a move has not been without its critics.⁴⁴

International conventions, it is argued, actually generate international legal norms ie prohibition of genocide. Real insight into what the treaty drafters intended is missing, because any good negotiator would merely contend that what was being drafted was merely a ‘restatement of the customary legal rule’, rather than an intent towards building a new norm of international law.⁴⁵

Reinterpreting the roles of state practice and *opinio juris*- Reviewing the role of state practice in customary norm formation, certain strands of the non-traditional scholarship have posited that, far from being a slow moving cautious process, the formation of customary international law through state practice and *opinio juris* is a dynamic and fast paced process – with the theoretical possibility of occurring nearly overnight. The key stressed by this scholarship is that *opinio juris* alone, rather than coupled with consistent state practice, formulates the foundational source of customary international law. State practice, if it has any role at all to play, is a secondary factor in customary international norm formation in that it can be thought of as composed of a general ‘communal’ acceptance (on the part of the community of states in the international system as a whole) rather than the expressed will of individual states. The non-traditional scholarship and its move towards reinterpreting the role of state practice and *opinio juris* in the formation of customary international law have provoked a series of push-backs by legal scholars who disagree heavily with its methods and conclusions. At their core, these push-backs argue that the reinterpretation of customary international law advocated by the non-traditional scholarship, one which, as has been seen, envisages the transformation of conventional international law into customary international law as a seamless process and minimizes the role of state practice as a key component in customary international law formation, poses a danger to the entire concept of customary international law.⁴⁶

⁴⁴ Op cit Baker B, R. pp 178

⁴⁵ Op cit Baker, B.R pp 181

⁴⁶ Op cit, Baker B,R. pp 182-183

Resolutions of international organizations- resolutions of international bodies such as the UN should be seen as possible starting points in the development of custom, not norm-generating acts in and of themselves. Many of the resolutions the UN General Assembly votes upon are aspirational in nature and are not intended to be embraced fully and unconditionally by those states voting for them. Given this fact, the act of using state practice and *opinio juris* together as the yardsticks of custom formation gains all the more importance, for only then can aspirational or symbolic acts be separated from those intended to be law-making – in the absence of state practice, these scholars claim, anything labelled as a customary norm of international law lacks legitimacy. Given this, although the traditional reliance on state practice and *opinio juris* in tandem may be far from perfect, these scholars see no other alternative which would preserve the consensual nature of international law.⁴⁷

In the *North Sea Continental Shelf* cases, the ICJ stated that the practice in question must have “occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved. “Once a practice becomes a custom, all states in the international community are bound by it whether or not individual states have expressly consented—except in cases where a state has objected from the start of the custom, a stringent test to demonstrate.

The *Lotus case* on ICJ in 1927 the first and foremost restriction imposed by international law upon a State is that-failing the existence of a permissive rule to the contrary-it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.⁴⁸

1.2 Elements of Customary international law

Sovereignty is the core principal of international law and international relations. The sovereignty refers to the supreme authority of every state within its territory. In the *Island of Palmas* arbitral award of 1928 stated: Sovereignty in the relations between States signifies

⁴⁷ Op cit, Baker, pp 183-184

⁴⁸ Lotus case ICJ France vs Turkish Republic, 1927, judgement no 10. Accessible http://www.icj-cij.org/files/permanent-court-of-international-justice/serie_A/A_10/30_Lotus_Arret.pdf. Pp 18-19(March 14, 2018)

independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state.⁴⁹

A number of principles and rules of conventional and customary international law derive from the general principle of sovereignty. Jurisdiction, obligation to respect certain immunities of other states. International Court of Justice has held that principle of respect for State sovereignty is closely linked with the principle of the prohibition of the use of force⁵⁰ and non-intervention.

⁵¹ ICJ court judgement on Nicaragua case states as follows: The Court should now mention the principle of respect for State sovereignty, which in international law is of course closely linked with the principles of the prohibition of the use of force and of non-intervention. The basic legal concept of State sovereignty in customary international law, expressed in, inter alia, Article 2. Paragraph 1, of the United Nations Charter, extends to the internal waters and territorial sea of every State and to the air space above its territory. As to superjacent air space, the 1944 Chicago Convention on International Civil Aviation (Art. 1) reproduces the established principle of the complete and exclusive sovereignty of a State over the air space above its territory. That convention, in conjunction with the 1958 Geneva Convention on the Territorial Sea, further specifies that the sovereignty of the coastal State extends to the territorial sea and to the air space above it, as does the United Nations Convention on the Law of the Sea adopted on 10 December 1982. The Court has no doubt that these prescriptions of treaty-law merely respond to firmly established and longstanding tenets of customary international law. ⁵²

Internal sovereignty has two international legal consequences. First, the infrastructure and activities are subject to domestic legal and regulatory control by the State. State may promulgate and enforce domestic laws and regulations regarding them. Second, the States sovereignty over its territory affords it the right under international law to protect infrastructure and activity that is located in, or takes place on, its territory. ⁵³

State practice and expressions of *opinio juris* are obligatory elements of any claim that an obligation to respect sovereignty is legally binding in customary international law. In this regard, it must be noted that States sometimes act in ways that affect, but do not violate, the

⁴⁹ Permanent Court of Arbitration. The Island of Palmas Case United States of America v. The Netherlands. April 4, 1928, page 7.

⁵⁰ ICJ, judgement on the case of Nicaragua v. United States of America. June 27, 1986, para 212.

⁵¹ Op cit, Tallinn Manual 2.0 pp 11-12

⁵² Op cit Nucaragua case para 212.

⁵³ Op cit, Tallinn Manual 2.0 pp 13

exercise of sovereign rights of other States, such as imposing sanctions that impact another State's domestic economic activities. Additionally, the term "sovereignty" frequently appears in political statements without necessarily carrying legal weight. Thus, it is essential to be sensitive to customary law's formal components of State practice and *opinion juris* when examining what States do, how they react to actions by other States, and what their officials say publicly. The examples that follow have been carefully selected as illustrations of the way in which States treat the issue of sovereignty in international law, rather than as an international relations concept. States have characterized a plethora of incidents as violations of their territorial sovereignty. It must be cautioned that some involved the armed forces and therefore may also have implicated the prohibitions of the use of force or coercive intervention. The fact that States at times chose to discuss an incident as a breach of their territorial in violability when the actions might also have crossed the use-of-force or coercive-intervention thresholds demonstrates that States consider the former to be a primary rule distinct from other primary rules that are based in the principle of sovereignty. Unconsented-to aerial intrusions have long been considered a violation of the subjacent State's territorial sovereignty. Noteworthy in this regard is the incident involving the downing of an unarmed American U-2 reconnaissance aircraft by the Soviet Union and the capture of its pilot in 1960. The United States did not protest the shoot-down. This reaction contrasts sharply with U.S. condemnation of the downing of an RB-47 reconnaissance aircraft by Soviet fighters and the imprisonment of its crew the same year. The difference can only be explained by virtue of the locations of the aircraft at the time of the shoot-downs, since both incidents involved military aircraft performing similar missions in the same year. In the case of the U-2, the aircraft was in Soviet national airspace, which both sides appeared to acknowledge was subject to Soviet sovereignty. By contrast, the RB-47 was flying in what the United States characterized as international airspace above the high seas. Accordingly, while the former involved a violation of national airspace, and thereby the Soviet Union's territorial sovereignty, the latter, at least in the U.S. view, did not.⁵⁴

According to Brian Lepard the traditional view of customary law has many benefits. It gives the customary law the rootedness that allows states expectations to converge around norms and puts states on fair notice about what is expected of them under those norms. The definition of *opinion juris* looks to the belief of states, not those of scholars, nongovernmental organizations or judges. Thus, the focus is on what states believe should be the rules and not on the wishful thinking of others. The definition of ICL is the requirement that states generally

⁵⁴ Op cit, Schmitt, M et al, Respect for Sovereignty in Cyberspace. Pp 1656-1657

believe that a given rule is desirable. There must be minimum of majority support among states for a rule to be created or changed. This constitutes the consistent or widespread practice and opinion juris among states. This requirement prevents a minority of states from changing an established rule. States generally believe that the rule would be desirable to implement now or in the near future. It helps to distinguish *lex lata* from *lex ferenda*. States are subject to the rule now or soon. States must be willing to abide by it in the present. This is important qualification that may eliminate many aspirational norms from recognition as new customary law. States must believe that it is desirable to implement an “authoritative “legal rule. By this states limit their own decision making in some way.⁵⁵

1.2.1 Universality principle

According to the familiar classic doctrine expressed in the Lotus Judgment, the source and test of a rule's opposability to a given state lie in that state's intention, as "expressed in conventions or by usages generally accepted as expressing principles of law." Where conventional rules are concerned, the formality that presides over the conclusion of treaties and the principle of relative effect have enabled consensualism to be established without ambiguity or restriction: whether a state is committed by a treaty, and as from when, can be precisely ascertained. Matters have never been so clear as regards customary rules: it has always been difficult to determine whether a given state is bound by a rule of that kind and, if so, as from what moment. Nevertheless, thanks to a subtle interplay of tacit intention and non-opposability, acceptance never ceased to be a linchpin of the classic theory of custom. Hence it remained possible for any state unwilling to be bound by a norm, whether of customary or conventional origin, not to be bound by it, and for the states owing this or that international obligation to be as easily identifiable as, conversely, those possessing this or that right. This situation is changing before our very eyes. Customary rules are now being described as general rules, and general rules are being analyzed as universal rules that are binding on all states without distinction, regardless of individual consent. As for that bastion of voluntarism, the conventional rules, a process is at work of absorbing them into the body of customary rules so as to subject them also to dilution.⁵⁶

⁵⁵ Op cit, Bradley, A. C. p 87

⁵⁶ Op cit, Weil, pp 433 art 27

1.2.2 Special custom. Instant customary law

Most of the discussion of customary international law focus on general custom and that applies worldwide. There can be CIL over smaller groups of states. This special or regional custom can exist among any number of states and potentially as few as two. If a subset of states meet the requirements of opinion juris and states practice (under the traditional definition of CIL) they are bound by a rule of special CIL.⁵⁷

Committee on formation of Customary Law report found that, it might be argued that “instant customary law” is a contradiction in terms: the very concept of customary law normally requires a certain amount of practice and the lapse of at least some time. It might further be suggested that it is too easy for States to be able to make law without the necessary discipline of having to back up their words with deeds and test their aspirations against reality. Against the first of these objections - the contradiction inherent in the concept of “instant customary law” – the response might perhaps be made that this is simply a matter of terminology: the essence of customary law is that it is the unwritten manifestation of the will of the international community as a whole, and the fact that, in the past, this has usually occurred through the slow accretion of practice is not the essential feature: in short, one should not be unduly attached to labels. To the second objection it might perhaps be retorted that although it is easy to make statements on the spur of the moment, without any real intention to take them seriously or for them to have legal consequences, this is not invariably the case. A formal protest, for instance, is a verbal act, but must be taken seriously in the context of the formation of customary law; similarly, a formal prize de position by a government is not “mere talk”. All depends on the context. Accordingly, if governments choose to take their formal stance by means of a General Assembly resolution, there is no a priori reason why this should not count. To put it in another way, Section 18 has already stated that if it can be shown that a particular State or States have consented to a particular rule, at any rate those States will be bound by it. So it would seem that, if it can be shown that States as a whole really did consent to the rule set out in the resolution, they would be bound. The word “if” in the preceding sentence is important, however. Given that General Assembly resolutions are not, in principle, binding, something more is needed to establish this consent than a mere affirmative vote (or failure to oppose a resolution

⁵⁷ Guzman, T, A. Saving Customary International Law, 27 Michigan Journal of International Law, 115 (2005) Accessible
http://heinonline.org/HOL/Page?men_tab=srchresults&handle=hein.journals/mjil27&id=171&size=2&collection=journals&terms=law|Customary%20Law|Law|customary|Customary&termtype=phrase&set_as_cursor=4. (March 19, 2018) p 115

adopted by consensus). It must also be recognized that not all authorities would accept that it is possible - even in exceptional cases - to dispense entirely with the need for at least some "real" practice.⁵⁸

According to Professor Weil there is a tendency to accept that a conventional provision can stand in for the "general" practice, provided the clause in question has been adopted by a sufficient number of states, and in particular by the states whose interests can be regarded as the most nearly affected. In that way a treaty clause can give birth to "instant custom"-or so says the theory of quasiuniversal treaties: instruments embodying rules that, simply because they have been accepted *qua* conventional by a large number of states, are supposed to be binding *qua* customary on the others. This is no mere acceleration of the custom-formation process, but a veritable revolution in the theory of custom. To bolster this new view of things, reliance has been placed on that famous passage in the *North Sea Continental Shelf* Judgment where the Court, envisaging the transformation of a conventional rule into a rule of general international law, explains how "it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected. 'Since the Court indicates elsewhere in the same Judgment that "the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule," nothing more was needed to prompt the conclusion that, in the eyes of the Court, a provision of treaty law adopted by enough sufficiently representative states could undergo instantaneous transmutation into a rule of customary international law. A few months later, in the *Barcelona Traction* case, the Court was explicitly to mention "international instruments of a universal or quasi-universal character."⁵⁹

A resolution by an international organization-may give birth to a norm of customary law, which, under the pretense of its generality, will be universally imposed on all states, including its opponents. This quite upsets the delicate balance on which the classic theory of custom was based, since *opinio juris* is by the same token dissolved in an ill-defined majority consent and more or less reduced to a vague "consensus."⁶⁰

⁵⁸ Op cit, International Law Association London Conference, pp 21-22, pp 62-63 art 32 e

⁵⁹ Op cit Weil, pp 435

⁶⁰ Op cit Weil, pp 438

1.2.3 Persistent Objector Doctrine

There is fairly widespread agreement that, even if there is a persistent objector rule in international law, it applies only when the customary rule is in the process of emerging. It does not, therefore, benefit States which came into existence only after the rule matured, or which became involved in the activity in question only at a later stage. Still less can it be invoked by those who existed at the time and were already engaged in the activity which is the subject of the rule, but failed to object at that stage. In other words, there is no "subsequent objector" rule.⁶¹ ICJ determined in its Asylum case⁶² in 1950 the persistent objector doctrine.

1.3 Customary humanitarian international law

This chapter analyzes two bodies of international law: that governing when states may resort to force (the *jus ad bellum*) and that applying during an armed conflict (international humanitarian law). Legal norms reside in treaties or are found in customary international law, the examination will address the sources of law first in the abstract and then in its context. General principle of law is the third source of international law and will be addressed as well. Any consideration of the international community's legal architecture, including that applicable to activities necessarily begins with art. 38 of the Statute of the International Court of Justice.

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply-

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

At the outset of any consideration of the law of armed conflict, it must be emphasized that the right of the parties to the conflict to choose methods or means of warfare is not unlimited.

⁶¹ Op cit Bradley, A.C et al pp 205.

⁶² ICJ, Asylum case, Colombia v Peru. 1950.

Despite the codification of much customary law into treaty form during the last one hundred years, four fundamental principles still underlie the law of armed conflict. These are military necessity, humanity, distinction, and proportionality. The law of armed conflict is intended to minimize the suffering caused by armed conflict rather than impede military efficiency.⁶³

1.3.1 Prohibition to use of force

Prohibition to use of force- *jus ad bellum*, deals with the prohibition of the use of force in Article 2(4) of the United Nations Charter and customary law, as well as the law of self-defense set forth in Article 51 and its customary law counterparts.

United Nations Charter article 51 allows states to use force in self-defense in situations amounting to an armed attack. As a general matter (the precise threshold is by no means settled) such operations must result in the destruction of property or injury to persons before qualifying as an attack that opens the door to a forceful response. In International Humanitarian law use of word war is historically term, that no longer enjoys the normative meaning associated with it for centuries when the fact that states were at war or had engaged in an act of war meant that certain bodies of law, such as the law of war and neutrality law, applied. Since the mid-twentieth century the term has been obsolete in international law. It was intentionally discarded by the international community in lieu of armed conflict in the four Geneva Conventions. This was done to emphasize that international humanitarian law applies irrespective of declaration of war or other legalistic formalities. The determination that states were at war involved in an armed conflict, would be factual. It is clear that when cyber operations accompany kinetic hostilities qualifying as armed attack taking place in Syria, International Humanitarian Law applies fully to all cyber operations that have nexus to the conflict, whether they are launched by state, non-state groups or individual hackers. In the same way that International Humanitarian Law prohibits injurious or destructive kinetic attacks against civilians and civilian objects, it likewise prohibits cyber-attacks against them having the same effect.⁶⁴

Armed attack is the legal term of the art in the *jus ad bellum* and in International Humanitarian Law as well. The term does not simply refer to military operations directed by one belligerent against another during an armed conflict. Rather it is defined in Article 49 of

⁶³ Op cit The joint service manual, p 21

⁶⁴ Op cit Schmitt et al, pp 28-29

Additional Protocol I to the Geneva Conventions⁶⁵ as acts of violence against the adversary, whether in offence or in defense. The definition of an attack lies at the core of International Humanitarian Law, because many of its prohibitions are framed in terms of prohibition of attacks, the paradigmatic examples being those on directing attacks against civilians and civilian objects.⁶⁶

1.4 New theories about customary international law and its elements

According to Professor Baker⁶⁷ two long-established sources of customary international law have been profoundly challenged in the past few decades. These two elements, the consistent practice of states, coupled with the determination (by the practicing state) that such practice is being undertaken out of a sense of legal obligation (labelled *opinio juris*), are no longer held in the high regard they once were. Indeed, since the 1970s, a wide range of newer non-traditional scholarship has emerged arguing against a strict adherence to state practice and *opinio juris* in determining customary international law and advocating instead a more relaxed interpretive approach. Within this vein, other scholars have gone further, arguing that widely ratified multilateral conventions or treaties which have established human rights prohibitions against genocide, torture, and slavery actually form confirmation of customary international law binding upon all states, not just the signatories.⁶⁸ More traditional-minded scholars have castigated its seeming attempt to create shortcuts to the generation of international norms.

According to one of the more prominent authors of this push-back, Professor Prosper Weil⁶⁹ the purpose of international law throughout the centuries has never been to better mankind, but rather has been to ensure a set of universally recognized and agreed upon rules which allow mankind to live in relative peace and order. Given this, the international legal system is always looking to ensure that its power and function are universally accepted and applicable, rather than hierarchical. Such a system is, argues Weil, by necessity all that

⁶⁵ Geneva Convention 1949, Additional Protocol (I) 1977 article 49- Definition of attacks and scope of application. 1. "Attacks" means acts of violence against the adversary, whether in offence or in defence.

⁶⁶ Op cit, Schmitt et al, pp 29-30

⁶⁷ Roozbeh B. Baker, PhD, is a Professor of Law, is currently a Lecturer at the University of Surrey (School of Law) in the United Kingdom, https://works.bepress.com/roozbeh_rudy_baker/

⁶⁸ Baker, B.R, Customary International Law in the 21st Century: old Challenges and New Debates. The European Journal of International Law vol 21. no1.2010. Accessible <http://www.ejil.org/pdfs/21/1/1988.pdf>. (March 20, 2018) pp 173-174

⁶⁹ Professor Prosper Weil is a French lawyer, professor emeritus of Maastricht University law school, member of Institut de Droit International, <http://www.idi-iil.org/en/membres/weil-prosper-fr/>

international law can ever hope to achieve whilst still maintaining universal acceptability. In Weil's view, by now seeking to create a pre-eminence or hierarchy of obligations based on their content rather than on how they are created (the process), the non-traditional scholarship and its adherents are exhibiting a complete lack of understanding for what international law is.⁷⁰

According to Brian D. Lepard a number of principles merit the status of "fundamental ethical principal" that are logically related to the principal of unity in diversity. This includes principle of human dignity and human rights, significant state autonomy, trust theory of government, punishment of criminals, limited state sovereignty, the right to freedom of moral choice, state duty to honor treaties. These are ethical principles, not norms of international law. Those principals may be relevant in determining whether or not particular norm of customary law should be recognized.⁷¹ This reformulation of opinion juris gives a dynamic quality and revision or terminology of existing ones, without any false beliefs on the part of state. Practical impact on judicial or governmental decision making of the current conception of opinion juris is difficult to gauge, there is no doubt that at the margins a requirement that states believe a norm already to be the law can be disincentive to the recognition of the new or modified law. This new concept of opinion juris removes this barrier to dynamism in the evolution of customary law.⁷²

Other scholars have suggested to modify the traditional way of definition of opinion juris. According to Curtis Bradley the rule of customary international law "can be recognized when it is evident- from state practice, statements, and other evidence- that the rule is something that the relevant community of states wishes to have as a binding norm forwards and that it is socially and morally desirable"⁷³. The opinion juris is the center of CIL not state practice. The consistent state practice is the evidence of opinion juris but not an essential requirement in its own right for every type of norm. Different types of norms are needed to different types of problems rather than adopting "a one size fits all" approach.⁷⁴

Customary international law is legally binding and soft law norms are not. But there are other differences as well. Soft law is easier and faster to create and modify than custom, making it useful for situations of uncertainty and experimentation where flexibility is prized. Whether

⁷⁰ Op cit Baker, B.R. pp 174-175

⁷¹ Op cit Bradley A. C. Customs Future. International Law in Changing Worlds. Pp 82-83

⁷² Op cit Bradley A. C. pp 83

⁷³ Op cit Bradley A. C, pp 83

⁷⁴ Op cit Bradley, A. C pp 83

states can alter an existing customary rule without violating it is a question that has long bedeviled scholars. Deviating from soft law incurs no international legal responsibility and no (or at least lower) political and reputational costs, neatly sidestepping these difficulties. Notwithstanding these design differences, many commentators assert that soft law's primary relationship to custom is as a precursor for hard law. As Christine Chinkin explains this view, "[o]nce a prospective norm has been formulated in soft form it can become a catalyst for the development of customary international law. To many commentators this is the *raison d'être* of soft law and its entry point into the traditional sources of law." Implicit in this perspective is the belief that states become habituated to nonbinding norms over time, eventually accepting them as CIL. The canonical example is the path to custom followed by the rights in the nonbinding Universal Declaration of Human Rights. ⁷⁵

In 2013, a group of Berlin-Potsdam-based international law scholars started study whether the international legal order is facing a significant structural change, which we referred to as - 'Rise or Decline of the International Rule of Law' ⁷⁶ Kolleg-Forcchergruppe is having a research working group of international lawyers in order to examine the role of international law in a changing global order. The research project pursues the goal of determining whether public international law, as it has developed since the end of the Cold War, is continuing its progressive move towards a more human rights and multi-actor oriented order, or whether we are seeing a renewed emphasis of more classical elements of international law. In this context the term "international rule of law" is chosen to designate the more recent and "thicker" understanding of international law. The paper discusses how it can be determined whether this form of international law continues to unfold, and whether we are witnessing challenges to this order which could give rise to more fundamental reassessments. ⁷⁷

In the same time ICJ was, in a set of novel, even revolutionary, opinions, setting up the doctrinal basis for a re-think of the traditional sources of customary international law.

In the Barcelona Traction decision, the ICJ, in adjudicating on a claim by Belgium on behalf of certain of its nationals who were shareholders in Barcelona Traction Ltd. (a trading company incorporated in Canada) against alleged actions of the Spanish state which Belgium

⁷⁵ Op cit Helfner, R. L pp 601-602

⁷⁶ Zimmermann, A. Times are Changing-and what about the International Rule of Law then? EJIL: Talk! Accessible <https://www.ejiltalk.org/times-are-changing-and-what-about-the-international-rule-of-law-then/>. (March 03, 2018)

⁷⁷ KFG International Law ride or decline_ The general questions. Accessible <http://kfg-intlaw.de/Research-Agenda/general-question.php?ID=1>. (March 03, 2018)

claimed were contrary to the principles of international law, greatly expanded the standing requirement under international law for states to claim violations. Normally, for a state to have standing to claim a violation of international law it must be directly affected by the violation at issue. However, as has been discussed, certain violations of customary international law are considered so vital that the system will allow any state to claim violation, and not simply the state directly affected – obligations *erga omnes*. In *Barcelona Traction*, the Court held that the ‘basic rights of human persons’ created *erga omnes* obligations. Thus, in the eyes of the Court, the protection of human rights did have a place in the international legal system.⁷⁸

2 Silence as consent in customary international law

According to Peter Tiersma⁷⁹ **silence is consent**- many are familiar with this adage, fewer have paused to reflect on its truth. There is no doubt that silence can be highly significant. Yet during most of our daily existence, our silence communicates nothing whatsoever. How can silence- the failure to speak- mean anything at all? Silence refers to a total absence of noise or sound. Or absence of speech. A person who remains silent in this sense might nonetheless communicate by nonverbal means. Using sign language or gestures. People do communicate by their failure to act, or by remaining silent. How is it then possible for people to communicate by doing nothing? Someone who remains silent- who does not speak or engage in nonverbal communication- would logically not seem to be communicating at all. In vast majority of cases, this is exactly what silence means. There are a surprising number of legal contexts where a person’s failure to act may be quite significant. This use of silence or inaction in the law dates back at least to Roman times. One manner of freeing slaves in Ancient Rome, termed a *manumission*, involved a fictitious application to the magistrate claiming that the slave was wrongly held in bondage. The ritual was modeled on the *vindicatio*, a process for the recovery of property. A third party, the *adsertor libertatis*, claimed the slave's freedom on his behalf, by using specified ritual words and touching the slave with a wand. The owner, whose presence was required during this ritual, would also touch the slave with a wand. Critically, however, the owner remained silent. The magistrate then declared the slave free. Because the slaveowner

⁷⁸ Op cit, Baker, B. R. pp 178-179

⁷⁹ Tiersma, M. P. was one of the United States of America's leading scholars of law and language. With a Ph.D. in linguistics and a J.D. from U.C. Berkeley, he authored numerous prominent books and articles exploring the relationship between words, linguistic media, meaning, and the workings of the law, <https://petertiersma.illinois.edu/>

expressed his assent by silence, he could not be incapable of speaking. Otherwise his silence would be meaningless. This is therefore an example of where silence truly communicated consent to the manumission, no less than if the owner had used words to the same effect. Perhaps the best known example from the common law is that an offer to enter into a contract can be accepted by silence. Of course, silence following the receipt of an offer usually has no legal significance. Yet although it is exceptional for silence to operate as an acceptance, there is no doubt that it is possible. Finally, remaining silent when one's rights are threatened may be deemed a waiver of the right in question. For example, failing to object to misconduct by the opposing side during a trial normally constitutes a waiver of that objection. As a consequence, any unvoiced allegation of misconduct or error may not form the basis of an appeal. Perhaps the most controversial legal use of silence is when a court attributes meaning to inaction by Congress or another legislative body. For instance, the Supreme Court may give a statute a specific interpretation. Congress, if it disagrees with this interpretation, has the power **to** amend the statute and to override the Court's interpretation. In such instances, if Congress does not act, its silence is often viewed as acquiescence in, or approval of, the Court's interpretation of the statute.⁸⁰

It is commonly said that "silence is consent." Often this is true enough. If generals in the field send a telegram to their commander-in-chief stating that they plan to bomb an enemy camp, and hear nothing in return, they can reasonably conclude, if communication lines are open, that the commander consents, or at least acquiesces in their action. What about silence of the populace in the face of government policies, especially tyrannical ones? This is sometimes also labeled consent. But surely the mere failure to protest does not necessarily indicate agreement with tyranny. People may be afraid to say anything. Those who suffered Holocaust during WWII may not have always verbalized their opposition, but it would be ludicrous to suggest that they consented to their fate. Others may plan to speak out but are awaiting the right opportunity. Some remain silent because "silent majority" as they endorse what their government is doing. Silence can often indicate apathy, preoccupation or fear. Knowing the persons political philosophy will help to guess the intention.⁸¹

⁸⁰ Tiersma, P. The Language of silence. Rutgers law review vol 48:1. Fall 1995. Accessible http://heinonline.org.ezproxy.utlib.ut.ee/HOL/Page?handle=hein.journals/rutlr48&div=8&start_page=1&collection=journals&set_as_cursor=6&men_tab=srchresults. (March 19, 2018) pp 1-100

⁸¹ Op cit, Tiersma, P. pp 8, Para 1, pp 9-10

As phrased by Corbin, "it is an old maxim that silence gives consent, but this is not a rule of law. According to Corbin, if *A*, without more, has made an offer to *B*, and *B* remains silent, no contract has been formed. Especially when the negotiating does not take place by face-to-face communication, silence can support a number of inferences: that the offeree did not receive or understand the offer; that the offeree feels no obligation to respond to an offer that she had not solicited; that the offeree is thinking it over; that the offeree assumes that by not responding, the offeror will figure out that she is not interested in the proposal. At the very least, the parties must act in a way that makes it look as though they have reached an agreement. Silence or inaction by the offeree is thus the very antithesis of acts that create contractual obligation. The prevailing rule-that mere delay under these circumstances is not acceptance-conforms to the general principle that silence following an offer or question is ordinarily nothing more than a failure to respond, and thus communicates nothing.⁸²

Despite fierce public critique, governments of EU member states have not objected to the ongoing practice of armed drone attacks. Whatever the reasons for this silence may be, in international law such non-reaction is not a mere absence. The silence of governments functions in particular ways and has become part of the current interpretative struggle about changing international principles regarding the right to self-defense and "targeted killing". While some experts count this silence as tacit consent to "targeted killing" practices others dispute its legal value. This article builds on the work of linguistics to explore the functioning of silence in the diplomatic language games. The dominant reading of government silence is acquiescence in international law. Proposing alternative readings of government silence, this article shows how any interpretation of silence is necessarily a political act which channels the debate over whether and how international law is changing. I reflect silence not against but through its inherent ambiguity, thus revealing some obvious and some less obvious dangers of the EU policy of silence.⁸³

2.1 Concept of acquiescence

According to Professor Malcolm N. Shaw the customary law is established by virtue of pattern of claim, absence of protest by states particularly interested in the matter at hand and acquiescence by other states. Generally, where states are seen to acquiesce in the behavior of

⁸² Op cit, Tiersma, P. The Language of silence. P 11

⁸³ Schweiger, E. The risk of remaining silent: International law formation and the EU silence on drone killings. Global Affairs. Volume 1, 2015, issue 3, pp 269-275

other states without protesting against them, the assumption must be that such behavior is accepted as legitimate. Some writers have maintained that acquiescence can amount to consent to a customary rule and that absence of protest implies agreement. In other words where a state or states take action which they declare to be legal the silence of other states can be used as an expression of opinion juris or concurrence in the new legal rule. This means that actual protests are called for to break the legitimizing process.⁸⁴

Perhaps the best known example from the common law is that an offer to enter into a contract can be accepted by silence. Of course, silence following the receipt of an offer usually has no legal significance. Yet although it is exceptional for silence to operate as an acceptance, there is no doubt that it is possible.⁸⁵

According to Nuno Sergio Marques Antunes in international law, the term ‘acquiescence’—from the Latin *quiescere* (to be still)—denotes consent. It concerns a consent tacitly conveyed by a State, unilaterally, through silence or inaction, in circumstances such that a response expressing disagreement or objection in relation to the conduct of another State (Protest) would be called for. Acquiescence is thus consent inferred from a juridically relevant silence or inaction. *Qui tacit consentire videtur si loqui debuisset ac potuisset* (he who keeps silent is held to consent if he must and can speak). Acquiescence is usually presented as having its roots in Anglo-American law (*acquiescence*) and French procedural law (*acquiescement*). That said, it is necessary to point out that the two previous concepts are clearly distinct. Whereas the former also operates in the realm of substantive law, the latter is confined to adjective law (ie the aggregate of rules of procedure and enforcement through which substantive law is implemented). These differences signal that extrapolations or transpositions thereof into international law should be carried out cautiously. Further, it should be borne in mind that similar concepts probably exist in other domestic systems. At the international level, this was already noted, for example, by Judge Ammoun, with respect to Islamic law, in the North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) (Merits) ([1969] ICJ Rep 121). here is perhaps little doubt nevertheless, that acquiescence (much like the related notion of estoppel) has emerged by virtue of the marked influence of Anglo-American legal thought in international law, in particular since the late 19th century. For example, the figure of *estoppel by acquiescence*, existent in Anglo-American law, has in it much of the hallmarks of acquiescence in international law.

⁸⁴ Shaw, N.M. International Law, 4th edition. Cambridge University Press, 1997. Pp 70-71

⁸⁵ Op cit Tiersma, P. p 4

Notwithstanding this, once transposed into international law, the notion of acquiescence was developed and elaborated within the framework of the international legal system. This took place, throughout the last century, in a number of judicial and arbitral decisions, and also in doctrinal and scholarly writings. In international law, acquiescence has primarily a substantive bearing. It operates in the realm of the vicissitudes of juridical situations. Rights and duties may be constituted, modified, disposed of or terminated by the effect of acquiescence. While it may impact on fields of law, its particular relevance in territorial and boundary issues, or issues relating thereto, deserves emphasis. The examples of case law below provide a useful illustration. Acquiescence as a legal tool is often used in third-party proceedings. Parties to disputes resort to it as means to assert or deny claims, through evidence such as treaties, maps, diplomatic correspondence, official documents and notes, records and archives, and the relative conduct of States. This evidence is contextualized within a specific factual matrix. And it is canvassed as an argument seeking to demonstrate the existence of consent expressed by the opposing party in some respect. Customary International Law has equally closely-knit relations with acquiescence. General toleration by the international community may lend support to an emerging customary rule, and lead to the departure from an existing rule (eg *Fisheries Case*); just as the non-existence of a general acquiescence of nations may indicate the non-existence of a rule (eg *Tinoco Concessions Arbitration*). The notion of acquiescence is not exempt from difficulties, the most prominent and complex of which being the polysemous nature of silence or inaction. The maxim *qui tacit consentire videtur* (he who keeps silent is held to consent) is contradicted by a neutral maxim *qui tacit neque negat, neque utique fatetur* (he who keeps silent is held neither to deny nor to accept). With respect to acquiescence, international law appears to have adopted a midway point between these two maxims. Silence or inaction is tantamount to consent only when qualified by reference to the *si loqui debuisset ac potuisset* requirement. The practice of courts has had a particular weight in confirming this content as derived from good faith and equity (Good Faith (Bona fide) and Equity in International Law). Thus defined, the juridical value and meaning of silence or inaction depends on the circumstances *in casu*. The *interpretation* of silence or inaction is then usually made in relative terms, account taken of the specific (sequence of) facts and the relationship between the States involved. International law remains a horizontal legal order, with a minor level of institutionalization. *Proprio sensu*, it lacks a 'legislator', an 'adjudicator' and an 'enforcer'. In such a legal order, where the interaction between subjects is paramount, and in which the principle of consent is preserved, acquiescence continues to be significant, in particular since protection of legitimate expectations and good faith in international dealings are ever more present. The concept of acquiescence, principled in nature, conveys a sense of certainty (good faith) and justice (equity).

In so far as these two notions are ever-prevailing aims of legal systems, and since acquiescence is a legal by-product of their implementation, it is likely to remain a cornerstone of the contemporary international law. Pleas of acquiescence similar to those aforementioned will thus continue to arise in the foreseeable future. Acuter problems may emerge nowadays when use of force. Silent conduct or inaction in respect of these issues will require a legal answer. The certainty and justice promoted by the concept of acquiescence, however, cannot be decoupled from the difficulties inherent therein. A cautious approach to findings of acquiescence continues to be warranted, the burden of proof lying on the party invoking it. Instances in which this may be relevant are far from uniform, and silence or inaction is seldom an adequate manifestation of consent. The issues surrounding acquiescence relate ultimately to a sphere of discretion which States enjoy, their conduct being under scrutiny in what are usually rather complex situations.⁸⁶

2.1.1 International Jurisprudence

According to Antunes identifying the case law in which acquiescence was (autonomously) referred to is not an easy task. Instances in which acquiescence was invoked are too numerous to be exhaustively dealt with here and cover virtually all subject-matters. Further, recourse thereto comes often hand in hand with estoppel-related arguments. Setting the two notions apart in mutually exclusive terms is rather difficult. A vaster jurisprudence referring to acquiescence, and conceptualizing it, emerged after the mid-20th century. Once more, courts dealt with it both in the affirmative and in the negative. Findings of acquiescence appear in the Fisheries Case (United Kingdom v Norway) (Merits) ([1951] ICJ Rep 134–39) Continental Shelf Arbitration (France v United Kingdom) (18 Rep Intl Arbitral Awards 68–74), Even cases in which no findings of acquiescence underlay the decision contributed to shape the notion of acquiescence, as happened with the *North Sea Continental Shelf Cases* (Germany v Denmark; Germany v Netherlands) (Merits) ([1969] ICJ Rep 25–7), *Continental Shelf Case* (Tunisia v Libyan Arab Jamahiriya) (Merits) ([1982] ICJ Rep 68–71, 83–5), Gulf of Maine Case (Canada v United States of America) (Merits) ([1984] ICJ Rep 303–12), Elettronica Sicula Case (United States of America v Italy) (Merits) ([1989] ICJ Rep 43–4), Territorial Dispute Case (Libyan Arab Jamahiriya/Chad) (Merits) ([1994] ICJ Rep 36–7) and Land and Maritime Boundary between Cameroon and Nigeria Case (Cameroon v Nigeria) (Merits) ([2002] ICJ Rep 333–55, 412–16,

⁸⁶ Antunes, N.S.M. Acquiescence. Max Planck Encyclopedia of Public International Law. Accessible <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1373?rskey=tnOAvH&result=1&prd=EPIL>. (April 23, 2018) art 1-28

437–48). Acquiescence is indubitably a notion that is entangled with the notion of estoppel. In the *Gulf of Maine Case*, the International Court of Justice (ICJ) stated that the same facts are relevant to both notions, and that it could take the two into consideration as they are different aspects of one and the same institution. It added also that both follow from the fundamental principles of good faith and equity. But the two notions are distinct. First and foremost, estoppel entails a detrimental reliance by one State. Evidence that that State has openly relied on a certain situation of fact, and that a change thereof would lead to undue prejudice (or an unjustified benefit for the other State), is the crucial element, enunciated by the ICJ in the *North Sea Continental Shelf Cases*. Secondly, acquiescence signals an expression of consent (albeit tacitly conveyed), whereas for estoppel to arise there is no requirement of consent. Irrespective of the existence of consent by a State, that State becomes bound by its conduct. These two elements characterize the predominant view on the distinction between these legal notions. The suggestion is further made that estoppel may emerge as legal consequence of an acquiescing conduct. The ICJ's finding of acquiescence in the *Temple of Preah Vihear Case*, followed by a finding of estoppel, evinces perhaps better than any other the entangled nature of the two notions, and how estoppel may indeed stem from an acquiescing conduct. Similarly, the *Electronica Sicula Case* illustrates this point by stating that an estoppel can arise in certain circumstances from silence, when something ought to have been said. The difficulties in disentangling the two notions can be such that some authors have actually suggested that estoppel is a useless institution, for it flows from a commitment of the State in relation to a certain situation, ie from consent.⁸⁷

Already in 1929, in the *Case of the Lotus (France v Turkey) (Merits)* (PCIJ Rep Series A No 10) (Lotus, The), the PCIJ stated that international law is based on the will of States expressed in conventions or in 'usages generally accepted as expressing principles of law' (at 18). The ICJ has developed the two-element theory of customary law, especially in the *North Sea Continental Shelf Cases* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) (Merits) ([1969] ICJ Rep 3), where it states that actions by States 'not only must amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of the rule of law requiring it. The need for such a belief, ie the existence of a subjective element, is implicit in the very notion of the *opinio iuris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation' (at para. 77).

⁸⁷ Op cit Antunes N.S.M. Acquiescence, art 6-10

Similarly, in the Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America) (Merits) (‘*Nicaragua Case*’) ([1986] ICJ Rep 14), the court stated: ‘For a new customary rule to be formed not only must the acts concerned “amount to a settled practice” but they must be accompanied by the *opinio juris sive necessitatis*’ (at para. 207). In the *Case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America) (Merits)* ([1984] ICJ Rep 246) (Gulf of Maine Case), the court speaks of ‘customary rules whose presence in the *opinio juris* of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas’.⁸⁸

ICJ emphasized that some degree of uniformity among states was essential before a custom could come into existence in Anglo-Norwegian Fisheries case. United Kingdom in its arguments against Norwegian method of measuring the breadth of the territorial sea, referred to an alleged rule of custom whereby a straight line may be drawn across bays of less than 10 miles from one projection to the other which could then be regarded as the measurement of the territorial sea. The court dismissed this by pointing out that the actual practice of states did not justify the creation any such custom. In other words, there has been insufficient uniformity of behavior. In the North Sea Continental Shelf cases which involved a dispute between Germany and Holland and Denmark on the other side, over the delamination of the continental shelf, the ICJ remarked that state practice had to be both extensive and virtually uniform in the sense of the provision invoked. This was held to be indispensable to the formation of a new rule of customary international law. However the court emphasized in the Nicaragua v United States case that it was not necessary that the practice in question had to be in absolutely rigorous conformity with the purposed customary rule. The threshold that needs to be attained before a legally binding custom can be created will depend both upon the nature of the alleged rule and the opposition it arouses.⁸⁹

According to Professor Shaw that acquiescence must be based upon full knowledge of the rule invoked. Where a failure to take a course of action is in some way connected or influenced or accompanied by lack of knowledge of all the relevant circumstances, then it cannot be interpreted as acquiescence.⁹⁰

⁸⁸ Traves, T. Customary International Law. Max Planck Encyclopedia of Public International Law. Accessible <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1393?rskey=atUoOQ&result=3&prd=EPIL>. (April 23, 2018) para 2 (17)

⁸⁹ Op cit Shaw, M. International law 4th ed. Pp 60-61

⁹⁰ Op cit Shaw, M. p 64

2.2 Collective security actions in Syria

In 1999, NATO countries bombed Serbian forces in Kosovo without U.N. Security Council authorization, seeking to prevent mass atrocities against the Kosovar Albanians. NATO's actions triggered a wave of soft law norm creation involving humanitarian intervention. The most ambitious soft law instrument, drafted by scholars and diplomats on the International Commission on Intervention and State Sovereignty (ICISS), articulated a new principle—the responsibility to protect (R2P)—that emphasized the duty of all nations to protect civilians at risk and suggested that states might, in exceptional circumstances, use force even absent U.N. Security Council approval. In the decade that followed, proponents of R2P sought to bolster this principle and its application to a range of humanitarian crises. However, when states themselves endorsed the R2P at the 2005 World Summit, they expressly rejected language suggesting that force could be used without U.N. Security Council authorization. The recent controversy over whether to use force in response to the atrocities in the civil war in Syria reveals the continuing competition among states over soft law and CIL in this area. The United Kingdom is a proponent of humanitarian intervention in Syria. The government did not, however, advance that claim by relying on the nonbinding R2P principle. Instead, it turned to custom. A 2014 letter from the Foreign and Commonwealth Office drew a sharp distinction between the “legal basis of humanitarian intervention and the concept of the responsibility to protect.”⁹¹

Eschewing R2P, the United Kingdom cited prior uses of force without U.N. Security Council approval—Kosovo in 1999, the Kurds in Northern Iraq in 1991, and the no fly zones in Northern Iraq from 1991. The United Kingdom reaffirmed this position with respect to Syria, arguing that “intervention may be permitted under international law in exceptional circumstances where the U.N. Security Council is unwilling or unable to act in order to avert a humanitarian catastrophe” The United Kingdom has not framed its options as a choice between soft law and hard law; rather, it has invoked custom as an alternative to both the U.N. Charter and the nonbinding R2P principle. Our framework also correctly predicts

⁹¹ A letter from Rt Hon Hugh Robertson MP, Jan 2014. Accessible <https://www.justsecurity.org/wp-content/uploads/2014/01/Letter-from-UK-Foreign-Commonwealth-Office-to-the-House-of-Commons-Foreign-Affairs-Committee-on-Humanitarian-Intervention-and-the-Responsibility-to-Protect.pdf>. (March 04, 2018)

How the United Kingdom would seek to develop this custom—by the projection of power and by raising normative arguments.⁹²

An analysis based on custom's domains suggests that, given the strong distributional effects of international rules on the use force, the confluence of normative and hegemonic custom explains why some states are choosing CIL to create new humanitarian intervention. The United States and the United Kingdom are powerful countries, supporting hegemonic custom. Humanitarian intervention also has a strong normative component. The United Kingdom relied in part on normative arguments in its 2013 statement on the use of force in Syria. The United Kingdom maintained that “[i]f action in the Security Council is blocked, the UK would still be permitted under international law to take exceptional measures in order to alleviate the scale of the overwhelming humanitarian catastrophe in Syria by deterring and disrupting the further use of chemical weapons by the Syrian regime. Such a legal basis is available, under the doctrine of humanitarian intervention.”⁹³ President Obama defended potential military intervention in Syria in part by asking “[w]hat message will we send if a dictator can gas hundreds of children to death in plain sight and pay no price?” Although it is still unclear whether the confluence of hegemonic and normative pressures will lead to the formation of a new customary rule, this example aptly illustrates not only the incentives that states have to choose custom as an alternative to treaties, but also the difficulty of operating with custom's domains.⁹⁴

It is generally accepted that the Security Council, instead of acting directly, may authorize Member States to use military force. This has become an established practice in spite of the criticism that, through this practice, the Security Council loses control over the enforcement actions undertaken by the States concerned. authorization of Member States or regional organizations to take forcible measures under Chapter VII can be divided into several decisions, namely, that there is a threat to international peace or security, a breach of peace or aggression, that measures under Article 41 of the UN Charter are not adequate and that a particular State, or groups of States or regional organization should take action. It is generally accepted that limits for the delegation of forcible actions exist. Such limits are not specified in the UN Charter; they evolve from general considerations on the delegation of powers. Such

⁹² Op cit Helfer, pp 605-606

⁹³ Chemical weapon use by Syrian regime- UK government legal position, Aug 2013. Accessible <http://i2.cdn.turner.com/cnn/2013/images/08/29/chemical-weapon-use-by-syrian-regime-uk-government-legal-position.pdf> . (March 03, 2018)

⁹⁴ Op cit Helfner, p 608

limits include a precise definition of the scope of the delegated power and the effective supervision of the functions exercised by the mandated entity. To assess the practice of the Security Council in this respect it is necessary to distinguish between targeted sanctions, peace keeping missions, the administration of territories and mandating military enforcement measures. It has been argued that the practice of the Security Council is not coherent in this respect. The report will return to this issue in the context of discussing judicial control and its limits.⁹⁵

United Nations Security Council has issued many resolutions about situation in Syria. Resolution 2254 from 2015 states following: Expressing its gravest concern at the continued suffering of the Syrian people, the dire and deteriorating humanitarian situation, the ongoing conflict and its persistent and brutal violence, the negative impact of terrorism and violent extremist ideology in support of terrorism, the destabilizing effect of the crisis on the region and beyond, including the resulting increase in terrorists drawn to the fighting in Syria, the physical destruction in the country, and increasing sectarianism, and *underscoring* that the situation will continue to deteriorate in the absence of a political solution.⁹⁶

2015 issued resolution no 2199 about ISIS and Al-Nusra's illicit funding via oil exports, traffic of cultural heritage, ransom payments and external donations.⁹⁷

2015 res no 2209 This resolution condemned the use of toxic chemicals such as chlorine, without attributing blame; stressed that those responsible should be held accountable; recalled resolution 2118; and supported the 4 February 2015 decision of the OPCW.

2015 resolution no 2249 Called for member states to take all necessary measures on the territory under the control of ISIS to prevent terrorist acts committed by ISIS and other Al-Qaida affiliates. The wording is as follows: art 5- Calls upon Member States that have the capacity to do so to take all necessary measures, in compliance with international law, in particular with the United Nations Charter, as well as international human rights, refugee and humanitarian law, on the territory under the control of ISIL also known as Da'esh, in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts committed

⁹⁵ Wolfrum, R. Judicial Control of Security Council Decisions. Yearbook of Institute of International Law, Tallinn Session, volume 76. Accessible <http://www.idi-iil.org/app/uploads/2017/06/04-Wolfrum-JurisdictionONU.pdf>. (March 19, 2018) pp 437-438

⁹⁶ UN Security Council resolution, S/RES/2254 (2015)

⁹⁷ S/RES/2199 (2015)

specifically by ISIL also known as Da'esh as well as ANF, and all other individuals, groups, undertakings, and entities associated with Al Qaeda, and other terrorist groups, as designated by the United Nations Security Council, and as may further be agreed by the International Syria Support Group (ISSG) and endorsed by the UN Security Council, pursuant to the Statement of the International Syria Support Group (ISSG) of 14 November, and to eradicate the safe haven they have established over significant parts of Iraq and Syria;⁹⁸

According to Ashley Deeks the operative paragraph 5 of Security Council resolution no. 2249 has unusual wording. Dapo Akande and Marko Milanovic have an excellent analysis of this provision on EJILTalk! There, they note that this provision is unprecedented. Most UNSCRs that authorize force have several features: (1) they contain a preambular paragraph that specifically invokes Chapter VII; (2) they use the word “decides” as the active verb in the paragraph that authorizes force; and (3) they use the term “all necessary means” or “all necessary measures” as the code for force authorization. OP5 is a hybrid, because it lacks the first two features but contains the third – “all necessary measures.” As a result, Akande and Milanovic conclude—correctly, I believe—that OP5 likely is not intended to serve as a stand-alone authorization for using force against ISIS in Syria and Iraq. Akande and Milanovic argue that the paragraph is crafted to create constructive ambiguity. The paragraph would seem to forge a compromise between Russia and all other states currently using force in Syria. Russia is acting against ISIS in Syria with Assad’s consent, and asserts that other bases for using force in Syria are inconsistent with international law. The United States, France, Canada, Australia, Turkey, and other states are using force in Syria on a theory of collective self-defense of Iraq or of national self-defense or both. ⁹⁹

2.3 Defeating the Islamic State (Daesh)

The Islamic State (ISIS) burst onto the world stage in 2014, capturing vast stretches of Iraq and Syria, brutally and publicly killing Western prisoners, and declaring itself a new pan-Islamic caliphate. President Obama announced an American effort to roll back and eventual defeat the Islamic State, and enlisted an international coalition of Arab and Western powers to accomplish that goal. This effort has, in turn, raised a host of new questions: about effectiveness and commitment, about international law, about presidential authority, about the interpretive

⁹⁸ S/RES/2249 (2015)

⁹⁹ Deeks, A. Threading the Needle in Security Council Resolution 2249. Accessible <https://www.lawfareblog.com/threading-needle-security-council-resolution-2249>. (April 14, 2018)

limits of an out-of-date domestic authorization for the use of force, and about the general viability of American policy in the region.¹⁰⁰

In 2015 the UK House of Commons Library has released “Legal basis for UK military action in Syria”. The current legal basis for military action in Iraq is also invitation and/or collective self-defense. In September 2014 the House of Commons voted in favor of the UK joining air strikes against ISIS/Daesh in Iraq (but not Syria). The motion cited Iraq’s ‘request for international support to defend itself against the threat ISIL poses to Iraq and its citizens’ as the ‘clear legal basis’ for military action in Iraq.¹⁰¹

Paulina Starcki published a paper in 2016 online (the paper has amendments made in 2018 and the process is still ongoing) titled “Silence within the process of normative change and evolution of the prohibition on the use of force- normative volatility and legislative responsibility”. Focusing on the operations of the ‘Global Coalition against ISIL’ in Syria, this article examines whether the mere silence of states in view of state actions that challenge the established reading of Arts. 2(4) and 51 of the UN Charter might induce and consolidate a process of normative change, and if so, under what conditions. While a ‘legislative responsibility’ is incumbent on states in situations of ‘normative volatility’, which requires them to ‘speak up’, I submit that silent behavior generates norm-evolutionary effects only under strict conditions. Such effects occur if other states and the international community can legitimately expect that a state makes its dissenting position known. The determination of such an expectation requires an overall assessment of numerous factors including: the determinacy of the legality claims made by the acting states, the capacity of silent states to act, the specific circumstances in which a claim was made, the determinacy of reactive claims of other actors, and questions of time, as well as the nature of the affected rules. I conclude by finding that mere passivity in light of the legality-claims currently made with regard to Coalition airstrikes against ISIL positions in Syria does not amount to ‘acquiescence’.¹⁰²

¹⁰⁰ ISIS. Warfare blog. Accessible <https://www.lawfareblog.com/topic/isis>. (April 14, 2018)

¹⁰¹ Poplin, C. Lawfare across the Atlantic: House of Commons Library Briefing Paper on Military Action in Syria. Accessible <https://www.lawfareblog.com/lawfare-across-atlantic-house-commons-library-briefing-paper-military-action-syria>. (April 14, 2018)

¹⁰² Starski, P. Silence within the Process of Normative Change and Evolution of the Prohibition on the Use of Force- Normative Volatility and Legislative Responsibility. Max Planck Institute for Comparative Public and International Law. No 2016-20. Accessible <https://poseidon01.ssrn.com/delivery.php?ID=356081026089002111099020119013020107002018062052016094106009118107008127101125003091126006036123018099112088083030114114017125104084063059092103083071070069100094079091092062118006119003007122008083092125067024008102122112105105126000088015069027126000&EXT=pdf> (April 14, 2018)

Global Coalition published an overview about airstrikes, civilian casualties and investigations on 2017 where the paper claim that how rigorous is the process for deciding which targets to strike. The Coalition strikes only valid military targets, after considering principles of military necessity, humanity, proportionality and distinction. We apply rigorous standards to our targeting process – and pilots can and do decide not to strike if they have any reasons to believe there is a risk of causing civilian casualties. In determining targets, they use a wide variety of tools, including visual sensors, human intelligence and signals intelligence, to not only identify where Daesh fighters may be located, but also to identify the objects on that battlefield that they value.¹⁰³

2.4 Doctrine of humanitarian intervention

International Humanitarian Law deals with how force may be employed by the parties to an armed conflict, known as *jus in bello*. International Humanitarian Law in particular customary international law and Geneva Conventions with their 1977 Additional Protocols¹⁰⁴, contains, inter alia, the rules governing attacks, delineates protection to which certain persons and objects are entitled, and restricts the kinds of weapons that may be employed in order to conduct hostilities.¹⁰⁵

Humanitarian intervention offers another illustration of custom's overlapping domains, provides another example of the substantive advantages of a custom over treaties that regulate the same subject area. The U.N. Charter prohibits the unilateral use of force in response to humanitarian crises in the absence of U.N. Security Council authorization or plausible claims of self-defense. U.N. Security Council approval is often blocked by political differences among

¹⁰³ Global Coalition. Airstrikes, Civilian casualties and investigations. Accessible <http://theglobalcoalition.org/en/airstrikes-civilian-casualties-and-investigations/>. (April 14, 2018)

¹⁰⁴ **Convention (I)**, for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949. **Convention (II)**, for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949. **Convention (III)**, relative to the Treatment of Prisoners of War. Geneva, 12 August 1949. **Convention (IV)**, relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949. **Additional Protocol (I)**, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June, 1977. **Additional Protocol (II)**, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts 8 June, 1977.

¹⁰⁵ Op cit, Schmitt et al, p 28

that body's five veto-wielding permanent members. Some states are dissatisfied with the status quo have turned to customary international law, implicitly or explicitly, to justify a military response to humanitarian crises if the U.N. Security Council fails to act. Such states are, in effect, claiming that custom offers a superior substantive norm that should displace the substantive constraints of the U.N. Charter.¹⁰⁶

The humanitarian intervention is the argument offered in the only legal opinion issued by UK government. There is no exception to the UN charter regime for humanitarian intervention. Responsibility to protect is the basis of humanitarian intervention and the principle is required action via UN.¹⁰⁷

UK government officially endorsed humanitarian intervention as a legal basis for using force against Syria. While it is not supported by a detailed legal analysis, it sets out three legal conditions for the use of force in a humanitarian intervention without UN Security Council authorization, and finds that Syria fulfils these criteria on the facts. This is as formal an expression of *opinio juris* by the UK as is possible, and probably the most official endorsement to date of humanitarian intervention (note also the absence of any reference to R2P). Humanitarian intervention is not permissible in international law as it stands today, on 29 August 2013. The key issue for me here is how the UK is essentially trying to change international law by asserting a position and waiting to see how other players will react and possibly validate its view; the conceptual problems that Dapo points to aside, this is essentially how customary law works. I'd also refer readers to an excellent 1994 piece by James Crawford and Thomas Viles called 'International Law on a Given Day', on custom as ex-post facto rationalization, which is excerpted in part here. The language of the UK guidance with regard to the three criteria reproduces almost verbatim an October 1998 FCO memo in respect of the impending intervention against the FRY, which is itself quoted in this article by Adam Roberts at p. 106. One key difference between the two memos is that the 1998 uses UN Security Council resolution 1199 and UN reports as convincing evidence of an impending humanitarian catastrophe, and this is missing with respect to Syria.¹⁰⁸ Philippe Sands QC, professor of international law at University College London, said the argument set out on Thursday by the

¹⁰⁶ Op cit Schmitt al, p 28

¹⁰⁷ Goldsmith, J et al, Bad Legal Arguments for the Syria Airstrikes. Lawfare. April 14, 2018. Accessible <https://www.lawfareblog.com/bad-legal-arguments-syria-airstrikes>. (April 14, 2018)

¹⁰⁸ Milanovic, M. Breaking: UK Government Discloses Legal Rationale for Syria Intervention. 2013, EJIL: Talk! Accessible <https://www.ejiltalk.org/breaking-uk-government-discloses-legal-rationale-for-syria-intervention/>. (March 07, 2018)

attorney general, Dominic Grieve, "is premised on factual assumptions – principally that the weapons were used by the Syrian government, that the use of force by the UK would deter or disrupt the further use of chemical weapons – that are not established on the basis of information publicly available". Sands said that in the absence of the UK invoking any right of self-defense or a UN Security Council resolution authorizing force, the coalition's case is premised on a legal argument about humanitarian intervention that is controversial but could be available under certain conditions. The government claim in its legal note that it is allowed to use strikes to "deter and disrupt" the further use of chemical weapons is also too lax, according to Dapo Akande, co-director of the Oxford institute for ethics, law and armed conflict. "Even if there is a rule allowing intervention to avert a humanitarian catastrophe that rule would not simply permit action to deter and disrupt use of chemical weapons," Akande said. "This standard is too lax. It would be a rule about preventing and about stopping. The UK is not proposing to take action which will actually prevent or stop further uses of chemical weapons." Grieve said the UK could legitimately take military action to "alleviate the scale of the overwhelming humanitarian catastrophe" as long as three conditions are met. That there is "convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief"; it is "objectively clear that there is no practicable alternative to the use of force if lives are to be saved"; and the proposed use of force is "proportionate to the aim of relief of humanitarian need". Akande said the case falls down on the second point because there are still avenues to be explored. "There are measures that the UK/US have not yet tried, for example trying to get approval from the UN general assembly under the 'uniting for peace' procedure," he said. "This would allow the general assembly to take action in cases where the Security Council is blocked by threat or use of the veto". He also said "action could be taken to refer the matter to the international criminal court – which is also action to deter further uses". Akande added that when the attorney general's advice says international law allows Britain to take measures to alleviate a humanitarian catastrophe without Security Council approval, this can only be in reference to customary international law which is based on the "views and practices of states". He said there is "very little evidence of state support for this view. Indeed most states have explicitly rejected this view."¹⁰⁹

¹⁰⁹ Booth, R. Syria: legal doubt cast on British government's case for intervention. Accessible <https://www.theguardian.com/world/2013/aug/29/syria-legal-doubt-british-intervention>. (March 07, 2018)

In the Committee's understanding, the Government considers that, under the doctrine of humanitarian intervention, it would be lawful for the UK to use force against another state without a UN Security Council resolution authorizing the use of such force, if the Security Council cannot agree to authorize the use of force, and if other conditions are met (convincing and generally accepted evidence of extreme humanitarian distress, no practicable alternative, proportionate and limited force). The Committee's understanding is based on the legal advice that the Government published on 29 August 2013 in connection with possible UK military action against Syria. legal position set out by the current Government at the end of August 2013 is the same as that advanced by the then Government in 1998-1999 with respect to the NATO military action against the then Yugoslavia (in the FCO note circulated to NATO Allies in October 1998 and the Defense Secretary's statement to the House on 25 March 1999). However, the Independent International Commission on Kosovo concluded in 2000 that the NATO military action was "illegal but legitimate. US to be as committed to the protection of civilians as the UK. The Administration's 2010 National Security Strategy¹¹⁰ makes clear that the US supports the concept of R2P and that in cases when prevention fails, "the United States will work both multilaterally and bilaterally to mobilize diplomatic, humanitarian, financial, and – in certain instances – military means to prevent and respond to genocide and mass atrocities". The position of the UK Government is that intervention may be permitted under international law in exceptional circumstances where the UN Security Council is unwilling or unable to act in order to avert a humanitarian catastrophe subject to the three conditions set out above. The UK Government does not consider that this has adverse implications for the UN. It also is important to recognize that the responsibility to protect emerged after NATO's humanitarian intervention in Kosovo. The responsibility to protect was in many ways a response to what its framers saw as the failures of the Security Council over its reaction to the genocide in Rwanda in 1994 (where it acted too late), and to the humanitarian crisis in Kosovo in 1999 (where it did not authorize an intervention). The adoption of the responsibility to protect was therefore an attempt to move debate away from a focus solely on external military intervention by emphasizing the responsibility of States towards their own populations, but also to signal the UN membership's support for the idea that, if necessary, the Security Council can and should act in the face of genocide, ethnic cleansing, war crimes and crimes against humanity; the expectation being that this political commitment would make Security Council action more likely and less controversial in future. As set out in the note of the Government's legal position published on 29 August 2013 in connection with possible UK military action against Syria, if

¹¹⁰ National Security Strategy 2010. Accessible <http://nssarchive.us/NSSR/2010.pdf>. (March 04, 2018) Pp 48-49

action in the Security Council is blocked, the position of the Government is that it is permitted under international law to take exceptional measures in order to avert a humanitarian catastrophe.

UK has used Legal basis is available, under the doctrine of humanitarian intervention, provided three conditions are met:

- (i) there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief;
- (ii) it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and
- (iii) the proposed use of force must be necessary and proportionate to the aim of relief of humanitarian need and must be strictly limited in time and scope to this aim (i.e. the minimum necessary to achieve that end and for no other purpose).

In October 1998 a Government note was circulated to NATO allies identifying these three key criteria.¹¹¹

A point of controversy of heightened relevance in the cyber context involves so called “war-sustaining objects. It is widely accepted that war-fighting” and “war-supporting” objects are lawful targets. Warfighting objects are those used to engage in the hostilities, such as military cyber infrastructure. War-supporting objects directly contribute to the hostilities, although they not used during them. Factories producing military equipment are the paradigmatic example and accordingly may lawfully be targeted by cyber means. “War-sustaining” objects only indirectly support the war effort. An example would be an industry that provides significant revenue upon which the armed conflict depends. This is most likely to be the case in situations where a state depends on proceeds or taxes from the industry to fund the war effort, as in the case of oil for many oil-exporting states. As an example, cyber infrastructure that controls oil storage facilities or a pipeline used for the transshipment of oil is, by the war-sustaining approach, a lawful military objectives. The United States takes the position that war-sustaining objects are valid targets that may be directly attacked. A majority of the International

¹¹¹ Op cit A Latter from Rt Hugh Robertson MP, 2014, pp 2-5

Group of Experts rejected the approach on the basis that the connection between such objects and military operations is too attenuated to produce a “definite military advantage.”¹¹²

2.5 Targeting war-sustaining military objects

Additional Protocol I (1977) to Geneva Convention of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts art 52 (2) states general protection of civilian objects. Paragraph 2 states that Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.¹¹³ Art 51 (5) (b) about protecting of the civilian population states that an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

According to Charlie Dunlap published a paper about why striking certain war-sustaining targets can save lives found that it would be wrong to *not* use means proven to effectively weaken a barbaric enemy while also being more protective of civilians than the alternatives. This controversial topic is focused on the current practice of the coalition opposing the Islamic States in Iraq and Syria (ISIS) striking ISIS oil facilities and cash hoards that are sustaining their ability on the battlefield. (The sale of oil is reportedly now the main source of Islamic States revenue.). As I explain in my post, there are “open source” reports that as much as two-thirds of ISIS’s “caliphate’s” budget goes for weapons and the pay of fighters. Moreover, there is other evidence that when the pay stops or is cut, ISIS fighters leave the field, or don’t come in the first place. In other words, the legitimacy of a “war-sustaining” target can be very fact-specific. But as to ISIS, the fact clearly favor the propriety of the particular wars-sustaining targets the coalition has been striking.¹¹⁴

¹¹² Schmitt, N.M. Peacetime Cyber Responses and Wartime Cyber Operations Under International Law: an analytical *Vade Mecum*. Harvard National Security Journal. Vol 8. 2017. Accessible <http://harvardnsj.org/wp-content/uploads/2017/02/Schmitt-NSJ-Vol-8.pdf>. (March 29, 2018)

¹¹³ Protocol Additional to Geneva Convention of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 8, June 1977. Accessibly <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=F08A9BC78AE360B3C12563CD0051DCD4>. (April 14, 2018)

¹¹⁴ Routledge Handbook of Air Power. Edited by Olsen, J. A. 2018.

According to Routledge Handbook of Air Power¹¹⁵ there has been debate going on about targeting war-sustaining objects and targeting ISIS oil production and distribution facilities. The main question remains whether the object meets the AP I 1977 art 52 (2) definition of a military objective. Prior to WW 2 the United States determined that the successful application of air power requires a predetermined plan calculated to destroy the enemy's will and war sustaining capabilities. Concluding operations to damage the enemy's will and war sustaining capabilities rather than simply wearing down the enemy's field forces, requires deconstructing enemy systems to identify objectives of particular strategic value. Sometimes those systems lie outside the traditional notion of a military target. On 22 Sept. 2014 a coalition led by US began aerial attacks in Syria against ISIS. The campaign included the controversial targeting of ISIS/controlled oil operations facilities. The coalition justified these attacks by stating that these small-scale refineries provide fuel to run ISIS operations, money to finance their continued attacks thorough Iraq and Syria, and they are an economic assets to support future operations. The controversial issue is whether war sustaining objects should be included in the legal meaning of military sustaining objects as economic objects of the enemy that indirectly but effectively support and sustain the enemy's war- fighting capabilities. However the characterization of war sustaining entities as lawful targets has been wildly criticized. Opponents argue that the requirement to make an effective contribution to military action suggests excluding objects that indirectly support the war effort, such as oil production facilities and oil transports not set aside for military use. The targeting of ISIS oil production is complicated in that the oil facilities and subsequent revenue are controlled by organized armed groups, not a state actor. ISIS does engage in some governance-like activities, it is not a state entity and it utilizes the revenue largely to fund insurgency and terrorism-related activities. Treaty law related to the targeting of civilian objects during a non-international armed conflicts is quite limited as compared to the law governing international armed conflicts. The general consensus exists that the targeting of civilian objects is prohibited during non-international armed conflicts, the particulars of that prohibition have an increased level of ambiguity. Closely related to the targeting of oil-related facilities is the issue of targeting individuals operating those facilities. The facility works who are not part of the organized armed groups, in this case ISIS, must be considered as civilians when conducting targeting analysis. More controversial is the targeting of members of ISIS whose function within the organized armed groups (OAG) is the operation or oversight of oil facilities, as opposed to those ISIS members with combat

¹¹⁵ Dunlap, J.D. Why striking certain war-sustaining targets can save lives. April 2017. Lawfire. Accessible <https://sites.duke.edu/lawfire/2017/04/10/why-striking-certain-war-sustaining-targets-can-save-lives/>. (April 14, 2018)

function. Considerable disagreement has emerged over whether members of an OAG are required to have a continued combat function to be considered legal targets. If such requirement exists, then members of ISIS whose function is solely to operate oil production and distribution would not be valid targets. If not then these workers are targetable by virtue of their membership in ISIS alone. It is tempting to view the lack of widespread objections by states to the targeting of ISIS oil assets as a signal that states are moving towards an acceptance of ISIS oil assets as a signal that states are moving towards an acceptance of targeting war-sustaining objects. This may be a political decision based on the widespread rejection of ISIS ideology and methods.¹¹⁶

According to Ryan Goodman argues “war sustaining objects in non-international armed conflicts used to generate revenue for an enemy’s armed forces, should be targetable under international humanitarian law.” Targeting War sustaining activities, even in the context of the fighting against ISIS, sets dangerous precedent and violates the established rules of IHL. The weight of scholarly opinion has long maintained that war sustaining objects are not legitimate military targets.¹¹⁷

I completely agree with views of Julia E. Padeanu.

2.6 Approaches on United Nations Security Council level

Security Council resolution 2170 from 2014 states that¹¹⁸:

Art 6. Reiterates its call upon all States to take all measures as may be necessary and appropriate and in accordance with their obligations under international law to counter incitement of terrorist acts motivated by extremism and intolerance perpetrated by individuals or entities Associated with ISIL, ANF and Al-Qaida and to prevent the subversion of educational, cultural, and religious institutions by terrorists and their supporters.

I argue that the wording of Security Council resolution is unusual to its usual strong call to take all measures necessary to take action. No strong wording for concrete action leaves room for interpretation and let States to decide whether they need to take action or stand still. Meaning

¹¹⁶ Routledge Handbook of Air Power. Edited by Olsen, J. A. 2018.

¹¹⁷ Padeanu, J.E. Accepting that War-sustaining objects are Legitimate Targets under IHL is a terrible idea. March 2017. Yale Journal of International Law, Accessible <http://www.yjil.yale.edu/accepting-that-war-sustaining-objects-are-legitimate-targets-under-ihl-is-a-terrible-idea/>. (April 14, 2018)

¹¹⁸ S/RES/2170 (2014) para 13 , 14

state do not say anything and use silence. Therefore Security Council is participating in forming silence and it could not be interpreted as an emergence or acceptance of new customary law norm as silence.

Art 13. Notes with concern that oilfields and related infrastructure controlled by ISIL, ANF and all other individuals, groups, undertakings and entities associated with Al -Qaida, are generating income which support their recruitment efforts and strengthen their operational capability to organize and carry out terrorist attacks;

Art 14. Condemns any engagement in direct or indirect trade involving ISIL, ANF and all other individuals, groups, undertakings and entities associated with Al - Qaida, and reiterates. That such engagement could constitute financial support for entities designated by the Committee pursuant to resolutions 1267 (1999) and 1989 (2011) (“the Committee”) and may lead to further listings by the Committee;

Resolution 2199 (2015)

“Reiterating its deep concern that oilfields and their related infrastructure, as well as other infrastructure such as dams and power plants, controlled by ISIL, ANF and potentially other individuals, groups, undertakings and entities associated with Al-Qaida, are generating a significant portion of the groups’ income, alongside extortion, private foreign donations, kidnap ransoms and stolen money from the territory they control, which support their recruitment efforts and strengthen their operational capability to organize and carry out terrorist attacks. Under Oil Trade section - 1. *Condemns* any engagement in direct or indirect trade, in particular of oil and oil products, and modular refineries and related material, with ISIL, ANF and any other individuals, groups, undertakings and entities designated as associated with Al-Qaida /.../“ Art 10. *Expresses concern* that vehicles, including aircraft, cars and trucks and oil tankers, departing from or going to areas of Syria and Iraq where ISIL, ANF or any other groups, undertakings and entities associated with Al-Qaida operate, could be used to transfer oil and oil products, modular refineries and related material, /.../ by or on behalf of such entities for sale on international markets, for barter for arms, /.../

Security Council has noted and condemned the action about direct or indirect commodity trade involvement in both above mentioned resolutions. If there is a lucrative trade agreement coming up between states there is a reasonable ground for the States involved to keep quiet and be silent about the upcoming beneficial gain from trade transaction. I argue that if there is an economical element attached to States practice about silence there is no possibility to interpret the silence

as emerging endorsement or acceptance to customary international law norm. States keep silent in order to protect their national economic interest only.¹¹⁹

UN International Law Commission in recent years has shifted away from codification efforts to principles, conclusions and draft articles that it does not recommend be turned into treaties. Using principal-agent theory the shift is explained by positing that increasing political gridlock in the UN General Assembly and it has led the Commission to modify the form of its work to preserve its influence in shaping the evolution of international law. The shift away from draft treaties increases the salience of the methodology that the International Law Commission uses to enhance its influence when the traditional constraint of UN General Assembly review is unavailable due to gridlock. International Law Commission will select and relatively consistently adhere to a methodological approach that attaching the support of the audience it hopes to persuade. Viewed this way a suggestion is made that the International Law Commission current project on the identification of International Law Commission promises to limit and by so limiting also expand the ICL importance in a post-treaty world.¹²⁰

International Court of Justice judgement on case concerning *Germany v. Italy* decision in 2012 gave example of CIL as it concerns sovereign immunity.¹²¹ In the judgement ICJ found in question whether Italy had violated Germany's jurisdictional immunity by allowing civil claims to be brought against that State in the Italian courts. The Court noted in this respect that the question which it was called upon to decide was not whether the acts committed by the Third Reich during the Second World War were illegal, but whether, in civil proceedings against Germany relating to those acts, the Italian courts were obliged to accord Germany immunity. The Court held that the action of the Italian courts in denying Germany immunity constituted a breach of Italy's international obligations. It stated in this connection that, under customary international law as it presently stood, a State was not deprived of immunity by reason of the fact that it was accused of serious violations of international human rights law or the international law of armed conflict.¹²²

¹¹⁹ Sir Michael Wood. 20 Essex Street. Accessible <http://www.20essexst.com/member/sir-michael-wood>. (March 02, 2018)

¹²⁰ Op cit, Bradley, pp 8-9

¹²¹ Op cit Bradley pp 3

¹²² *Germany v. Italy, Jurisdictional Immunities of the State*, ICJ Feb 3, 2012

Conclusion

Customary international law is, along with treaties, one of the principal sources of international law. Before the proliferation of the treaty making in the twentieth century, customary international law was the predominant source, regulating issues such as diplomatic immunity, rights of the sea, and the conduct of war. Treaties are written, making their content easier to determine, they are expressly negotiated and ratified, making them more consensual and making them a potentially better vehicle for addressing the complexity of modern problems.

The systematic study of silence as emerging new customary international law is ever evolving. Inequality among actors as in international community may have grating effect on customary law-making as it lacks formalized procedure of law-making and the central role is played by behavior. I tried to seek to establish an understanding whether the international customary law has changed or evolved about silence over time. I found during my research that silence cannot be interpreted as immediate acceptance of new emerging customary international law as silence or inaction is seldom an adequate manifestation of consent. I view that silence should not be interpreted as an acceptance. The conventional view today arises out of state practice that is followed out of sense of legal obligation. Agreement of this two element definition of Customary International Law, however, has the potential to obscure a lack of agreement over issues such as what constitutes state practice, how much state practice is enough, and what materials demonstrate a sense of legal obligation (also known as *opinion juris*). Contemporary international lawmaking is characterized by the rapid growth of new soft law instruments and a decline in the conclusion of new treaties. States can establish customary international law through three activities- freely subject itself to the customary rule (consent), keep silent (acquiescence) or consistently object to the application of the rule. Silence as consent would be different if the state keeps silent, therefore silence cannot be interpreted as consent as there is no information what the aim of the state is. States are bound only to those rules and norms what they have consented to.

The state practice essential to establishing customary law must, even if of limited duration, be consistent. When there are significant deviations from a practice by states, which may include both engaging in an activity and refraining from one, a customary norm cannot materialize. Although minor infrequent inconsistencies do not constitute a bar to such emergence, repeated inconsistencies generally have to be characterized by other states as violations of the norm in question before a customary norm can be said to exist. For instance,

it is clear that the prohibition on the use of force set out in Article 2(4) of the UN Charter constitutes a customary norm; yet states have historically engaged in the use of force and continue to do so today. The saving factor is that when they do, their conduct is, absent the justification of self-defense, typically styled by other states as wrongful.

The wording of Security Council resolution no. 2249 (2015) is unusual to its usual strong call to take all measures necessary to take action. No strong wording for concrete action leaves room for interpretation and let States to decide whether they need to take action or stand still. Meaning state do not say anything and use silence. Therefore Security Council is participating in forming silence and it could not be interpreted as an emergence or acceptance of new customary law norm as silence.

Security Council has noted and condemned the action about direct or indirect trade involvement. If there is a lucrative trade agreement coming up between states there is a reasonable ground for the States involved to keep quiet and be silent about it. I found that if there is an economical element attached to States practice about silence there is no possibility to interpret the silence as emerging endorsement or acceptance to customary international law norm. States keep silent in order to protect their national economic interest.

Traditional view of customary law has many benefits. It gives the customary law the rootedness that allows states expectations to converge around norms and puts states on fair notice about what is expected of them under those norms. The definition of *opinion juris* looks to the belief of states, not those of scholars, nongovernmental organizations or judges. Thus, the focus is on what states believe should be the rules and not on the wishful thinking of others.

The essence of customary law is that it is the unwritten manifestation of the will of the international community as a whole, and the fact that, in the past, this has usually occurred through the slow accretion of practice is not the essential feature: in short, one should not be unduly attached to labels. To the second objection it might perhaps be retorted that although it is easy to make statements on the spur of the moment, without any real intention to take them seriously or for them to have legal consequences, this is not invariably the case. A formal protest, for instance, is a verbal act, but must be taken seriously in the context of the formation of customary law.

The fight against ISIS (Daesh) has been done via bombing ISIS oil trucks by United Kingdom and United States of America. According to Additional Protocol I (1977) to Geneva Convention of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts art 52 (2) states general protection of civilian objects. Paragraph 2 states that Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. Art 51 (5) (b) about protecting of the civilian population states that an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

In the research I found that the requirement to make an effective contribution to military action suggests excluding objects that indirectly support the war effort, such as oil production facilities and oil transports not set aside for military use. The targeting of ISIS oil production is complicated in that the oil facilities and subsequent revenue are controlled by organized armed groups, not a state actor. ISIS does engage in some governance-like activities, it is not a state entity and it utilizes the revenue largely to fund insurgency and terrorism-related activities.

Treaty law related to the targeting of civilian objects during a non-international armed conflicts is quite limited as compared to the law governing international armed conflicts. The general consensus exists that the targeting of civilian objects is prohibited during non-international armed conflicts, the particulars of that prohibition have an increased level of ambiguity. Closely related to the targeting of oil-related facilities is the issue of targeting individuals operating those facilities. The facility workers who are not part of the organized armed groups, in this case ISIS, must be considered as civilians when conducting targeting analysis. More controversial is the targeting of members of ISIS whose function within the organized armed groups is the operation or oversight of oil facilities, as opposed to those ISIS members with combat function. Considerable disagreement has emerged over whether members of an organized armed groups are required to have a continued combat function to be considered legal targets. If such requirement exists, then members of ISIS whose function is solely to operate oil production and distribution would not be valid targets. If not then these workers are targetable by virtue of their membership in ISIS alone. It is tempting to view the lack of widespread

objections by states to the targeting of ISIS oil assets as a signal that states are moving towards an acceptance of ISIS oil assets as a signal that states are moving towards an acceptance of targeting war-sustaining objects. This may be a political decision based on the widespread rejection of ISIS ideology and methods. Ryan Goodman argues “war sustaining objects in non-international armed conflicts used to generate revenue for an enemy’s armed forces, should be targetable under international humanitarian law.” Targeting War sustaining activities, even in the context of the fighting against ISIS, sets dangerous precedent and violates the established rules of International Humanitarian Law. The weight of scholarly opinion has long maintained that war sustaining objects are not legitimate military targets.

I will conclude my paper by Professor Weil statement and I completely agree with it: the purpose of international law throughout the centuries has never been to better mankind, but rather has been to ensure a set of universally recognized and agreed upon rules which allow mankind to live in relative peace and order. Given this, the international legal system is always looking to ensure that its power and function are universally accepted and applicable. Such a system is, by necessity all that international law can ever hope to achieve whilst still maintaining universal acceptability. The question remains does current state of affairs need a change in legal system? International jurists and commentators must realize that, with the redesigning of the general customary norm of state practice and *opinio juris*, will probably develop contradiction and problematic international norms.

List of acronyms

CIL- Customary International Law
ECtHR- European Court on Human Rights
EU- European Union
ICJ- International Court of Justice
ILC- International Law Commission
IHL- International Humanitarian Law
ICRC- International Committee of Red Cross
ISIS- Islamic State of Iraq and the Syria
NATO- North Atlantic Treaty Organization
R2P- responsibility to protect
SC- Security Council
UK- United Kingdom
UN- United Nations
USA- United States of America

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License